91-1202
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No. ____

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IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 1991

Ann Richards, Governor of Texas; Selden Hale, III, Mamie Moore Proctor, Hon. Clarence N. Stevenson, Allan B. Polunsky, James M. Eller, F. L. Stephens, Jerry H. Hodge, Joshua W. Allen, Sr., Ellen J. Halbert, Members, Texas Board of Criminal Justice; James A. Lynaugh, Executive Director, Texas Department of Criminal Justice,

Petitioners

v.

John Lindsay, Harris County Judge; El Franco Lee, Jim Fonteno, Steve Radack, Jerry Eversole, Harris County Commissioners; Johnny Klevenhagen, Harris County Sheriff,

Respondents

v.

Lawrence R. Alberti, Jimmy E. Collins, Henry C. Langer, Jose' J. Pina, II, Pat Reed, Wesley Sellers, individually and on behalf of all others similarly situated,

Respondents

On Petition for Certiorari
To the United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI
Appendices A-R

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APPENDIX A

Lawrence R. ALBERTI, et al.,
Plaintiffs-Appellees,

v.

The SHERIFF OF HARRIS COUNTY, TEXAS et al.,
Defendants-Third Party
Plaintiffs-Appellants, Appellees,

In re Ann RICHARDS,
the Governor of Texas, et al.,
Third Party Defendants-Appellants.

Nos. 90-2441, 90-6034, 91-2274 and 91-2801.

United States Court of Appeals,
Fifth Circuit.
July 25, 1991.

Before REAVLEY, HIGGINBOTHAM, and DUHE, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

This is another chapter in the now epic struggle of Texas with its bulging prisons. The reality is that the colloquial expression "state pen" has often been apt. Harris County, Texas, after many years of federal prodding, brought its jails into substantial compliance with constitutional standards. County jails in Texas house both county and state prisoners. A substantial portion of a county's jail population consists of prisoners destined for the state prison system. The struggle of Harris County for an adequate jail system was frustrated by the state's refusal to take its state prisoners. This delay served state penalogical goals, but its resulting success at the state level

came out of the hide of Harris County. Judge DeAnda of Houston and Judge Justice of Tyler have commendably presided over this intricate fracas, and we find today no errors in their effort. We are compelled to remand findings of county and state liability due to an intervening decision of the United Sates Supreme Court. We do so despite compelling evidence of state liability, and some evidence of county liability, only because the requisite fact-findings required by the new law were understandably not made and we decline to exceed our appellate role by supplying the findings.

I.

A. *Procedural background.*

It will soon be twenty years since Lawrence Alberti and his fellow prisoners filed a class action on behalf of past, present, and future inmates of Harris County jails. The complaint named members of the Harris County Commissioners Court and the Harris County Sheriff's Department as defendants and, pursuant to 42 U.S.C. § 1983, alleged that the jails' conditions violated numerous constitutional and statutory provisions.

The original district judge, Judge Bue, conducted extensive hearings, including visits to the facilities. He concluded that conditions in the jails were "inhumane." The plaintiffs and the county then entered into a consent decree on February 4, 1975. The decree called for renovations of existing facilities, the development of a new central jail, and improvements in staff and security. The district court retained jurisdiction to issue further interim orders, and shortly thereafter, on December 16, 1975, the court issued a lengthy opinion setting forth broad guidelines for the streamlining of the criminal justice system, the implementation of an effective pre-trial release program, and the improvement of living conditions within the jails.

At the time of the decree, the county's facilities consisted of a central jail, with a design capacity of 1150, at 301 San Jacinto and a detention center, with a design capacity of 810, in Humble, Texas. In 1982, spurred by the consent decree and later remedial orders, the county completed a new central jail, with a design capacity of 3505, at 1301 Franklin and closed the old central jail. Attendant staffing and supervision concerns were the subject of several additional orders by the *Alberti* court. *See Alberti v. Klevenhagen*, 606 F.Supp. 478 (S.D.Tex. 1985); *Alberti v. Heard*, 600 F.Supp. 443 (S.D.Tex. 1984). The county also commissioned an expert, Dr. Charles Friel, to consider future needs. Pursuant to his projections, the county authorized the construction of a third jail facility, with a capacity of 4000, at 701 North San Jacinto and the renovation of the old central jail, to house 400, at 301 San Jacinto.

The county filed a motion for final judgment and permanent injunction on February 20, 1987. Shortly thereafter, on April 28, 1987, the *Alberti* court appointed three monitors--a special master, a medical monitor-assessor, and a jail monitor-assessor--to periodically inspect the jails and to assess their conditions, to make findings on the county's compliance with its orders, and to determine the maximum capacities of the jails. *See Alberti v. Klevenhagen*, 660 F.Supp. 605 (S.D.Tex. 1987). The monitors issued their first report on October 7, 1987. Of the eighteen conditions surveyed, the monitors found full compliance as to nine, partial compliance as to seven, and non-compliance only as to two, medical and dental care and drug and alcohol treatment. The monitors also found that, as of June 1, 1987, the county's fails were only five percent over their design capacity. However, in light of the inordinate delay in achieving substantial compliance, the monitors recommended continued supervision by the *Alberti* court.

B. *The state's scheduled admissions policy.*

The state of Texas has been beset with its own overcrowding problems. In 1985, after many years of litigation

in *Ruiz v. Estelle*, the state entered into a "crowding stipulation," agreeing to limit the population in its prisons to 95% of capacity. *See Ruiz v. Lynaugh*, 811 F.2d 856 (5th Cir. 1987). To stay within the limits, the state periodically closed its prisons to convicted felons sentenced to the state's prison system, and ready for transfer, but awaiting transfer in county jails. In September of 1987, the state attempted to order the rationing with a "scheduled admissions policy," setting daily quotas on the number of ready-felons that it would accept into its prison system from each county.

As stated by the monitors, "[t]he painful consequences for Harris County of this new admissions policy quickly became evident." A backlog of ready-felons developed, and on December 17, 1987, the *Alberti* court directed the monitors to reassess the jails' conditions in light of the state's new policy. The monitors issued their report on March 21, 1988. They found that the jails were "clean, well-run, and reasonably safe and secure," but warned of the potential consequences of the state's scheduled admissions policy:

> What this quota policy means for the defendants is obvious. Over the preceding years, the number of convicted felons in Harris County facilities awaiting transfer to the TDC fluctuated regularly between 100 and 200. By the end of September, 1988 [sic], that number was up to 512; by December 31, 1987, the number stood at 798. Even more alarming than the growth itself is the likelihood that it will continue at about the same rate for the foreseeable future. . . . Harris County is, in effect, operating an 800-bed facility for TDC, by March or April, they may be operating the equivalent of a 1,000 bed facility.

By September of 1988, the monitors' dire forecast was realized. In their fourth report, issued on September 12, 1988, the monitors found that the jails' population increased from 4576 in

January of 1988 to 5650 in July of 1988, or thirty percent over design capacity. The monitors concluded that the jails were dangerously overcrowded:

> All systems are impossibly stressed, including food service, programming, elevators, recreation, classification, maintenance, visiting, supplies of clothing and bedding, security, medical care, and mental health services. So far these stressed systems have not broken down completely under the population pressures, but the Monitors believe that there is no elasticity left in the institution and its service systems.

The monitors further concluded that the appropriate capacities of the central jail at 1301 Franklin and the detention center in Humble were 3330 and 770 respectively, or 95% of design capacity. They recommended that the *Alberti* court direct the county and state to immediately reduce the jails' population to 120% of design capacity (4200 at the central jail and 970 in the detention center) and also set future population caps at 110% of design capacity upon the completion of the renovation of the old central jail at 301 San Jacinto and 95% of design capacity upon the completion of the new facility at 701 San Jacinto.

On November 8, 1988, on the basis of the monitors' report, the *Alberti* court *sua sponte* directed the county sheriff to transport and deliver to the Texas Department of Corrections (later the Texas Department of Criminal Justice--Institutional Division) at least 290 ready-felons each week beginning December 5, 1988. The court reasoned that, under Texas law, "the TDC, not Sheriff Klevenhagen or the Harris County Commissioner's Court, is responsible for housing persons who have been convicted of felony offenses in the State criminal courts." In support of this conclusion, the court cited Tex.Penal Code §§ 12.32-12.34, Tex.Code Crim.Proc. Art. 42.09 § 2, and Tex.Rev.Civ.State. Art. 6166r (now Tex.Gov.. Code § 499.006). The state, however, refused to accept ready-felons

above the quota allocated to the county in its scheduled admissions policy, leaving the county unable to comply with the order.

By December of 1988, the population of ready-felons in the county's jails leaped to over 2100, representing more than a third of the jails' population. On December 12, 1988, the county moved the *Alberti* court to require the plaintiffs to join state officials as additional defendants, urging that it could not achieve constitutional compliance without the participation of the state. The *Alberti* court denied the motion on January 12, 1989, but allowed the county to file a third-party complaint against the state. In the third-party complaint, the county prayed that the court enjoin the state to immediately remove all ready-felons from its jails, the county sought no monetary damages.

The state moved to dismiss the county's third-party complaint and, alternatively, for the joinder of all Texas counties and all ready-felons backlogged in Texas county jails. The state also moved to dismiss for lack of venue, to transfer venue, and to stay the *Alberti* proceedings pending an application to the judicial panel on multidistrict litigation. On May 12, 1989, the *Alberti* court denied the motion, reasoning that the state had a state law duty to "speedily" accept ready-felons and a federal constitutional duty not to impose cruel and unusual punishment on felons. *See* Tex.Rev.Civ.State. Art. 6166r (now Tex.Gov. Code § 499.006). If the state violated the latter constitutional duty, continued the court, then *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984), would not bar an order compelling compliance with constitutional standards. The court also denied the venue arguments, concluded that *Ruiz* was no bar to the third-party complaint, refused to abstain, and found the joinder of all other Texas counties unnecessary.

C. *The In re Clements bifurcation.*

On May 30, 1989, the plaintiffs moved the *Alberti* court to transfer to the *Ruiz* court their pending motions for a population cap on the county's jails and the county's motion for an order directing the state to remove ready-felons from its jails. The state joined the request that the third-party complaint be transferred to the *Ruiz* court.

Meanwhile, on June 26, 1989, the state moved the *Alberti* court to reconsider its May 12 order in light of a recently enacted statute, H.B. 2335, Tex.Gen. & Special Law 1989, Reg.Sess., Ch. 785, effective September 1, 1989. H.B. 2335 made a number of changes in the state's criminal justice system. Most relevant to this appeal, H.B. 2335 created the Texas Board of Criminal Justice as a replacement for the Texas Department of Criminal Justice, deleted the word "speedy" from Tex.Gov.Code § 409.006, and authorized the adoption of the scheduled admissions policy. Alternatively, the state moved the *Alberti* court to transfer the third-party complaint to the *Ruiz* court; the state objected, however, to the transfer of the plaintiffs' pending motions.

The *Alberti* court denied both the requests for transfer and the motion to reconsider on July 10, 1989. The court reasoned that the transfer was not required by this court's *en banc* decision in *Gillespie v. Crawford*, 858 F.2d 1101 (5th Cir. 1988), nor would it advance the purposes of *Gillespie*. As to the adoption of H.B. 2335, the court stated:

> [t]he fact that Third-Party Defendants may no longer have a state-law duty to 'speedily' accept convicted felons contrary to their admissions allocation formula does *not* abate their federal Constitutional duties toward these felons. . . . Third-Party Defendants' federal Constitutional duty to not impose cruel and unusual punishment

> upon convicted felons remains, regardless of the actual location of the felons' confinement.

The plaintiffs and the state then petitioned for a writ of mandamus from this court. We granted the writ in part on August 11, 1989, transferring to the *Ruiz* court

> so much of the *relief* portion of the third-party complaint as seeks an injunction ordering our individual petitioners (in their official capacities) to receive or take prisoners into TDC confinement or to otherwise take action in the operation or management of TDC-operated confinement facilities.

In re Clements, 881 F.2d 145 (5th Cir. 1989).

D. *The bench trial.*

The population of ready-felons in the county's jails continued to escalate, and by March of 1989, the jails' total population exceeded 7200, forcing 2700 prisoners to sleep on the floors each night. As stated by the monitors, "[t]o put this into some perspective, Harris County now has more prisoners sleeping on the floors of its detention facilities than the total number of convicted offenders incarcerated in each of fourteen states." In light of the increase in total population, the monitors revised their recommendations in a report issued on April 11, 1989. They suggested that the *Alberti* court direct the county and state to reduce the jails' population to 7000 (6000 in the central jail and 1000 in the detention center) within 30 days, 6400 (5500 in the central jail and 900 in the detention center) within 90 days, 5800 (4990 in the central jail and 810 in the detention center) within 180 days, and 5200 (4390 in the central jail and 810 in the detention center) within 270 days. They further suggested that the *Alberti* court set a final population cap of 8732, equal to design capacity, upon completion of the new facility at 701 San Jacinto. In a report issued the following

month, on June 1, 1989, the monitors concluded that "living conditions for inmates . . . have become intolerable, shocking to the conscience and unequivocally unconstitutional."

The *Alberti* court held a "merits-liability" bench trial August 14 through 18, 1989. By the time of the trial, the total population in the county's jails stood at 8086, or 188% of design capacity, with ready-felons, then a population of 3420, representing 45% of the total population. A parade of witnesses testified to the ill effects of the overcrowding. The lead special master, J. Michael Keating, described "much attenuated protection" because of inadequate staff, inadequate ventilation and food service, supply shortages, precarious fire safety, and a medical care system on the verge of collapse. The captain of the central jail, Don McWilliams, concurred with Keating's assessment and, in addition, testified to "a spectacular increase in the incidence of disciplinary infraction."

The *Alberti* court held an additional hearing on the plaintiffs' requests for supplemental relief September 12 through 15, 1989. At the hearing, the court expressed its concern that the county's joinder of the state as a third-party defendant could suffer jurisdictional defects under *Pennhurst*. Upon the court's suggestion, the plaintiffs sought leave to file a supplemental complaint against the state on September 15, 1989.

The *Alberti* court issued its findings of fact and conclusions of law on September 25, 1989. The court opened its opinion by granting the plaintiffs' motion for leave to file the supplemental complaint. It found that the conditions in the jails were "cruel and unusual," citing extreme overcrowding as "the primary cause" of the constitutional violation. More specifically, the court found that 2800-2900 prisoners slept on the floor each night, forming a "human carpet" in some cellblocks, that the staff was inadequate to assure the safety of all prisoners, that there had been a great increase in disciplinary violations, that there were problems with plumbing and ventilation, that fire safety was "severely compromised," that

supplies and food service were inadequate, that medical care conditions reflected "conscious indifference towards the inmates' serious medical needs," and that county judges gave greater weight to pre-trial release recommendations than state judges.

The *Alberti* court concluded that the county was liable for the violation because, under Texas law, its sheriff and commissioners court were keepers of the jails. Tex.Local Govt. Code §§ 351.001-351.015 and 351.041-351.042. The court further found the state jointly liable because, under Texas law, it had the "primary responsibility" for convicted felons. Tex. Rev. Civ.Stat. Art. 4413(401) § 1.02. In the opinion, the *Alberti* court also transferred the third-party complaint and the supplemental complaint to the *Ruiz* court.

On October 11, 1989, the county moved to supplement or amend the September 25, 1989, findings of fact and conclusions of law and, alternatively, for a new trial. The *Alberti* court denied the motion on October 23, 1989. Shortly thereafter, both the county and the state filed protective notices of appeal. This court dismissed the appeals as premature on January 3, 1990.

E. *Subsequent remedial orders.*

After the transfer to the *Ruiz* court in the September 25 findings of fact and conclusions of law, the *Alberti* and *Ruiz* courts combined to hold joint hearings and issue joint orders on the remedial aspects of the *Alberti* case.[1] The parties at first

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[1] In an opinion issued shortly after the transfer, Judge Justice described the transfer as partial. Citing *In re Clements*, he stated that:

> It is apparent from the Court of Appeals' opinion that the *Alberti* court retains the power to order certain forms of relief against the State Defendants, so long as that relief does not require those defendants to "receive or take

(Footnote continued on next page)

engaged in settlement negotiations, but when the prospects for settlement dimmed, the combined courts ordered the county and state to submit proposed remedial plans by January 17, 1990. After the parties submitted their proposed plans, the combined courts held joint hearings on February 27 and 28, 1990.

On March 15, 1990, the combined courts entered a joint remedial order, directing the county and state to reduce the jails' population to 6700 upon entry of the order and to 6100 by August 31, 1990. The order contained a number of additional provisions, addressing among other matters a reduction in the population of ready-felons, the development of alternatives to incarceration, and releases of prisoners in the event of non-compliance.

After the parties moved the combined courts to alter or amend the order, the courts vacated the March 15 order and replaced it with a second order, *nunc pro tunc*, on April 5, 1990. The April 5 order directed the county and state to reduce the jails' population to 6700 upon entry of the order, to 6400 by May 15, 1990, and to 6100 by August 31, 1990. The order specifically required the state to remove 9130 ready-felons between February 1 and August 31, 1990. The state complied with this aspect of the order. Like the March 15 order, the April 5 order provided for the development of alternatives to incarceration and, in addition, directed releases of prisoners in the event of non-compliance. The combined courts denied the parties' motions to alter or amend the order, or for a new trial on April 25, 1990.

The April 5 order proved effective in reducing the jails' population. By August 13, 1990, the total population stood at

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prisoners into TDC" or to take other action "in the operation or management of TDC-operated facilities."

Judge Justice proceeded to direct his special master in *Ruiz* to confer with the *Alberti* special master.

6097, or 130% of design capacity, and the population of ready-felons had dropped to 1069. The renovation of the old central jail at 301 San Jacinto, completed in December of 1989, had increased the combined design capacities of the county's jails to 4698.

Upon the expiration of the April 5 order, the combined courts issued a third joint remedial order on September 7, 1990. In the order, the courts purported "to bridge the next 12 months" until the completion of the new facility at 701 San Jacinto, designed to house an additional 4000 prisoners. The order first required the county to occupy the new facility by September 1, 1991, and provided for "a substantial daily fine for each day beyond September 1, 1991 they failed to occupy the 701 Building." The order further directed the county and state to reduce the jails' population to 6100 upon entry of the order and to 6000 by December 31, 1990, capping the ready-felon population at 1350 and the remaining population at 4751, to be reduced to 4650 by December 31, 1990. Again, like the earlier orders, the September 7 order provided for the development of alternatives to incarceration and directed releases of prisoners in the event of non-compliance.

Pursuant to the September 7 order, the *Alberti* court issued four orders directing the release of 254 pretrial and convicted misdemeanants on September 14, 17, and 18, 1990. Both the county and the state appealed this order. The state obtained a partial stay of the order from this court on September 21, 1990. We later withdrew the stay on the understanding that, first, the combined courts would not release felons without sufficient notice for application by the parties for further stay and, second, that the parties would work together "to obtain a process that will protect the public safety and the integrity of the criminal justice system as well as the rights of prisoners."

Prior to the releases, the county and state had moved the combined courts to alter or amend the September 7 order, or alternatively, for a new trial. The *Alberti* court set a hearing for

October 22, 1990, and ordered the defendants to submit new proposed remedial plans. The court specifically announced that the alternatives to be considered at the hearing would include "(1) temporary housing and the expense and time necessary for the construction thereof and (2) the utilization of facilities of nearby counties which may have available jail space." After the hearing, the court concluded that the county and state had "not yet developed a feasible strategy for addressing the overcrowding problem in Harris County detention facilities that precludes the need for further releases of inmates, although elements of a possible solution surfaced." The court accordingly directed the defendants to meet with the monitors in the *Alberti* and *Ruiz* cases and "to jointly develop an acceptable plan for dealing with the short-term population crisis in Harris County facilities."

On November 19, 1990, the *Alberti* court stayed the releases authorized in the September 7 order, giving the county and state sixty days to implement alternative programs designed to bring the jails' population within the caps set in the September 7 order. The November 19 order also contained a fallback provision; it stated that if the required caps were not met within sixty days, the court would require "the defendants, or either of them . . . to contract for the use of private jail cells or empty county jail cells around the State to house excess prisoners."

On February 7, 1991, upon finding that the jails' population still exceeded the caps set in the September 7 order, the *Alberti* court issued a fourth remedial order. Evidencing a growing impatience, the court refused the state's request to further delay implementation of the population caps established in the earlier orders. Instead, the court implemented an alternative remedy pending the opening of a boot camp in April of 1991 and the new facility at 701 San Jacinto in September of 1991. The order first directs the county and state to reduce the jails' population to 6300 within 45 days. County prisoners, including felons not ready for transfer, are not to exceed 4725

(75% of capacity), and ready-felons are not to exceed 1575 (25% of capacity). If necessary to meet the population caps, the order directs the county sheriff to transfer ready-felons to facilities in other counties. The state is required to deposit $750,000 with the *Alberti* court's registry by March 20, 1991. The order authorizes the county to pay up to $40 per day for the housing of each transferred prisoner, the expenditures are to be reimbursed by the state's deposit to the extent that ready-felons exceed the 1575 cap.

Unlike the previous remedial orders, the February 7 order was not a product of the combined courts. Instead, Judge Justice wrote separately "to clarify my relationship to the relief set forth." Although he conceded that the order was within the scope of *Alberti*, he suggested that the requirement that the state deposit $750,000 "seemingly falls within the purview of *Ruiz*" and stated that he "would abstain" from deciding whether, under Texas law, the state was obliged to pay costs incurred by the county in housing ready-felons in other counties' facilities.

Both the county and state filed motions to modify the February 7 *Alberti* order. The state also filed a motion to vacate the order and a notice of appeal. While the motions to vacate were pending, the state petitioned for a writ of mandamus from this court, asking that we vacate the portion of the February 7 order requiring the state to deposit $750,000 and, in addition, either enforce or modify our previous decision in *In re Clements*. Alternatively, the state requested a stay of the portion of the order requiring the $750,000 deposit, a writ of prohibition, summary reversal, or certification to the Texas Supreme Court.

On March 15, 1991, the *Alberti* court slightly modified the order and denied the motions to vacate or stay the order. The county and state then filed new notices of appeal. On March 21, 1991, this court similarly denied the state's request for a stay of the portion of the order requiring a $750,000 deposit. The Supreme Court temporarily stayed the provision

the same day, but on April 1, 1991, withdrew the stay. The state and county now appeal the September 25 findings of fact and conclusions of law and each of the subsequent remedial order.

II.

The county and the state initially offered little resistance to the assertion that excessive overcrowding in the county's jails renders the conditions of confinement for the plaintiff class unconstitutional. While this appeal was pending, however, the Supreme Court held in *Wilson v. Seiter*, ___ U.S. ___, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991), that the Eighth Amendment "mandate[s] inquiry into a prison official's state of mind when it is claimed that the official has inflicted cruel and unusual punishment." In supplemental briefs to this court, each defendant argued that only the other acted with the requisite intent.

Even after *Seiter*, then, the heart of the appeal remains the relative responsibilities of the state and county. The county believes that the state should shoulder full responsibility, as the overcrowded conditions have resulted largely from the huge backlog of ready-felons. The state, on the other hand, contends that state law places full responsibility for the jails on the county. In formulating its remedial orders, the *Alberti* court faced the difficult task of remedying the constitutional violation without intruding on the state's right, as a sovereign, "to decide who will be held liable for civil rights violations that occur in the course of carrying out [state powers]." *Bush v. Viterna*, 795 F.2d 1203, 1209 (5th Cir. 1986). We believe the balance was well struck by the *Alberti* court. However, we vacate and remand the liability findings against the state and the county to allow the *Alberti* court to consider the effect of *Seiter*. Before addressing the liability and remedial issues, we turn to two jurisdictional issues.

A. *Jurisdictional issues*:

1. *The expired remedial orders.*

[1] The first three remedials orders, issued on March 15, April 5, and September 7, are now expired. The county argues that the orders are still appealable, however, because the issues presented by the orders are "capable of repetition, yet evading review." *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). We took this position in an order denying the state's motion to dismiss the county's appeal of the first remedial order as moot but noted that, upon further consideration, the oral argument panel might find the appeal moot. The plaintiffs contend that the first two remedial orders are moot even under *Bell* because the latest order, issued on February 7, 1991, expressly "superseded" them. However, we continue to find the county's characterization convincing. *See National Wildlife Federation v. Costle*, 629 F.2d 118, 123-24 n. 19 (D.C.Cir. 1980).

2. *The medical care findings.*

[2, 3] In its September 25 findings of fact and conclusions of law, the *Alberti* court suggested that the medical conditions in the county's jails constituted an independent constitutional violation.[2] However, none of the remedial orders specifically address medical care. The plaintiffs contend that the county's challenge to the medical care findings is thus premature. We agree with the plaintiffs, but not fully with their characterization of the relevant jurisdictional defect. There has been no final judgment in the *Alberti* case, and the state and county are thus appealing the remedial orders under 28 U.S.C. § 1292(a)(1). As medical care has not yet been implicated in a

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2 The *Alberti* court found that the poor level of medical care reflected "conscious indifference towards the inmates' serious medical needs." Under *Seiter*, 111 S.Ct. at 2321, and *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), this finding alone establishes an Eighth Amendment violation.

remedial order, the related findings are outside the § 1292(a)(1) exception to the final judgment rule.

B. *Liability issues*:

1. *The relative obligations of the state and the county.*

[4] The starting point in evaluating the relative obligations of the state and the county is *Bush v. Viterna*, 795 F.2d 1203 (5th Cir. 1986). In *Bush*, a class of county inmates brought an action under § 1983 to compel a newly created state commission, the Texas Commission of Jail Standards, to discharge its state law duties. The authorizing statute required TCJS to establish minimum standards for county jails and to review reports of noncompliance. Additionally, the statute gave TCJS discretionary enforcement powers. The plaintiffs urged a "supervisory liability" theory, suggesting that TCJS legally caused constitutional wrongs that it failed to prevent or correct. In rejecting the plaintiffs' theory, we reasoned that Texas law identifies county sheriffs and commissioners courts, not TCJS, as keepers of the county jails. *Id.* at 1206. *Bush* thus concluded as follows:

> [A]ccepting for now the concept that the breach of a state-imposed duty can cause a constitutional tort, we hold that the necessary causal relationship is absent when a state duty to regulate, monitor, inspect, or advise is not accompanied by an obligation to extirpate constitutionally substandard conditions or activities that may be encountered.

Id. at 1208.

Particularly relevant to this appeal is the final section of *Bush*, where we explained "the different roles that state and federal law inevitably play in the analysis of constitutional

torts." *Id.* at 1208. Whenever a plaintiff alleges a cause of action under § 1983, a federal court must ask three questions. First, is a federally secured right affected? In some cases, particularly procedural due process cases, the federal court must look to state law to answer related threshold questions, such as "whether the claimant in fact had a property right in whatever it was that was taken away from him," but the right itself is defined by federal standards. *Id.* at 1209. Second, was the alleged deprivation of the right accomplished by state action? Here again, some reference to state law is necessary, but "the definition of state action is ultimately a question of federal law." *Id.* Finally, who is the state actor responsible for the violation? Unlike the first two questions, the third question turns *exclusively* on state law. "The states have virtually complete freedom to decide who will be responsible for such tasks, and therewith to determine who will be held liable for civil rights violations that occur in the course of carrying them out. *Id.*

The hard question in this appeal is the third question, the issue of who is liable for the conditions in the county's jails. The county clearly has some responsibility for the conditions in its own jails. Texas law requires the county's commissioners court to provide "safe and suitable jails" and makes the county's sheriff "keeper of the county jail." Tex.Local Govt.Code §§ 351.001 and 351.041. The county does not deny these obligations; rather, it argues that the objectively cruel conditions in its jails have resulted solely from the state's backlogging of ready-felons. For reasons discussed more fully below, *Seiter* gives some new fuel to the county's argument.

By contrast, the state denies any responsibility for the conditions in the county's jails. The *Alberti* court twice rejected the state's contention that Texas law makes the county solely liable, first in an order denying the state's motion to dismiss the county's third-party complaint and again in its September 25 findings of fact and conclusions of law. The court distinguished *Bush* because "[i]n contrast to the Texas Commission of Jail Standards, Third-Party Defendants have a state and constitu-

tionally imposed duty to provide appropriate conditions of confinement for the approximately 3500 convicted felons currently incarcerated in the Harris County Jails." In support of this conclusion, the court cited *Stewart v. Winter*, 669 F.2d 328 (5th Cir. 1982), a remarkably similar case.

In *Stewart*, a class of inmates housed in Mississippi county jails brought an action against both county and state officials under § 1983 to challenge the conditions of the jails. The district court granted the state's motion to dismiss on the ground that the state had no authority over the county's jails. On appeal, however, this court held that the district court erred in dismissing the claims against the state. We reasoned as follows:

> Several of the named plaintiffs, and thousands of the putative class members, are state prisoners committed to the custody of the Mississippi Board of Corrections. The district court's holding would allow the defendant state officials to relegate their prisoners to "cruel and unusual punishment" so long as they have no power to change the conditions of confinement in county jails. We reject this theory. This court has consistently held that state officials cannot disclaim responsibility for cruel and unusual conditions of confinement of prisoners in their custody on the ground that it is beyond their power to effect the changes necessary to bring the conditions up to minimal standards. [citations omitted] Even if the district court were correct in deciding that the defendant state officials have no authority to make changes in county jails, the district court could have ordered the state officials to remove prisoners in their custody from any county jail found constitutionally inadequate, or, in the alternative, offered them the opportunity to assist the county in making the

> necessary changes in order to continue using the jail to incarcerate state prisoners.

Id. at 332.

Benjamin v. Malcolm, 803 F.2d 46 (2d Cir. 1986), and *Tate v. Frey*, 735 F.2d 986 (6th Cir. 1984), like *Stewart*, involved essentially identical situations. In *Benjamin*, after city inmates brought a § 1983 challenge to the conditions of New York City jails, the city moved to join the state of New York as a third-party defendant. The city contended that the overcrowding in its jails resulted from the state's failure to accept convicted felons as required by state statute:

> When a sentence of imprisonment is pronounced, or when the sentence consists of a fine and the court has directed that the defendant be imprisoned until it is satisfied, the defendant must forthwith be committed to the custody of the appropriate public servant and detained until the sentence is complied with.

N.Y. Criminal Procedure Law § 430.20. The district court granted the city's motion and directed the state to accept felons within 48 hours from the completion of transfer processing.

On appeal, the Second Circuit rejected the state's *Pennhurst* argument and affirmed the order joining the state. Its opinion echoes of *Stewart*:

> [P]risoners whom [the state] refuses promptly to accept into its prisons are not those of some other state, county, or planet, but its own prisoners who have been convicted by New York State courts of New York felonies. The State cannot therefore wash its hands of its *federal constitutional responsibility* for the detention conditions of such prisoners because they are

> temporarily housed in City facilities or because a New York statute requires the State to accept them "forthwith."

Id. at 51 (emphasis in original).

In *Tate*, after county inmates brought a § 1983 challenge to the conditions in Jefferson County jails, the county filed a third-party complaint against the state of Kentucky. The state had adopted a "controlled intake policy" pursuant to a consent decree in litigation involving its own prisons, and in accordance with the policy, refused to timely accept felons in the county's jails awaiting transfer to state prisons. After finding that the overcrowded conditions in the county's jails were caused in part by the state's policy, the district court issued an order directing state officials to reduce the number of felons in the county's jails by transferring felons to a state prison within thirty days of sentencing.

On appeal, the state argued that the district court erred in allowing the third-party complaint. The Sixth Circuit affirmed, finding a "substantive basis" for the claim in a state statute:

> When an indeterminate term [1 year or more] of imprisonment is imposed, the court shall commit the defendant to the custody of the bureau of corrections for the term of his sentence and until released in accordance with the law.

Kentucky Revised Statute § 532.100. An accompanying commentary states that § 532.100 "assures that felony offenders, once convicted and sentenced to imprisonment, *shall* be delivered to the Department of Corrections, with the specific place of incarceration to be left to the Department." As the case involved a preliminary injunction, the Sixth Circuit reviewed the district court only for abuse of discretion. But the Sixth Circuit rejected the state's *Pennhurst* argument, affirming the

district court's finding that the state was partly responsible for the unconstitutional conditions in the county's jails.

The state's attempt to distinguish *Benjamin* is without merit. The state argues that the result in *Benjamin* turned partly on the fact that New York's refusal to accept convicted felons made it "impossible for the city to comply with the district court's judgment against it in the plaintiffs' favor." The state then cites *Badgley v. Vareles*, 729 F.2d 894, 901 (2d Cir. 1984) for the proposition that, if complete relief can be obtained from the county, then there is no right to an order against the state. The real difference between *Benjamin* and *Badgley*, however, was that in *Badgley* New York was not adjudicated a constitutional violator. *See Benjamin*, 803 F.2d at 52.

The state's reliance on *Bush* is thus misplaced unless the Texas scheme is significantly different from the schemes in Mississippi, New York, and Kentucky. In its September 25 findings of fact and conclusions of law, the *Alberti* court reasoned that the state was jointly liable for the unconstitutional conditions in the county's jails because, although the sheriff is the keeper of the jail, the state is responsible for the confinement of convicted felons under Tex.Pen.Code §§ 12.31-12.34 and Tex. Code Crim. Pro. Art. 42.09. Before the 1989 amendments, continued the court, the transfer of convicted felons was governed by the interplay between Tex. Code Crim. Pro. Art. 42.09 and Tex.Gov. Code § 499.006--§§ 1 and 4 of Art. 42.09 envisioned "at least a temporary stay at the jail when a felon does not appeal his conviction or when a felon appeals his conviction but his sentence is for a term of ten years or less," while § 499.006 provided for a "safe and speedy" transfer to a state facility.[3]

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[3] The relevant Texas provisions are as follows:

1. *Tex.Pen.Code Ch. 12 (punishments) §§ 12.31-12.34 (ordinary felony punishments):*

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These provisions state that individuals adjudged guilty of a capital felony, first-degree felony, second-degree felony, or third-degree felony "shall be punished by confinement in the Texas Department of Corrections."

2. *Tex.Rev.Civ.Stat. Art. 4413(401) (Department of Criminal Justice) § 1.02 (responsibilities):*

This provision states that the Department of Criminal Justice has "primary responsibility for (1) the confinement, supervision, and rehabilitation of felons."

3. *Tex.Code Crim.Pro. Ch 42 (judgment and sentence) Art. 42.09 (commencement of sentence, delivery to place of confinement):*

Section 1 states that, except as otherwise provided, the defendant "shall be delivered to jail or to the Department of Corrections when his sentence to imprisonment is announced." If the defendant is convicted of a felony and sentenced more than ten years, and he gives notice of appeal, § 3 states that he "shall be transferred to the Department of Corrections on a commitment pending a mandate from the court of appeals or the Court of Criminal Appeals." If on the other hand, he is convicted of a felony and sentenced less than ten years, and he gives notice of appeal, § 4 states that he shall only be transferred to the Department of Corrections upon his request. *See Ex parte Rodriguez*, 597 S.W.2d 771 (Tex.Cr.App. 1980). None of the provisions specify the proper course *absent* an appeal. Finally, § 8 states that the Department of Corrections "shall not take a defendant into custody" until it receives specified documents from the county.

4. *Tex.Code Crim.Pro. Ch. 104 (certain expenses paid by state and county) Art. 104.002 (expenses for prisoners):*

This provision states that "a county is liable for all expenses incurred in the safekeeping of prisoners confined in the county jail or kept under guard by the county." It also provides for inter-county (but not state-county) reimbursements.

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Although the 1989 amendments deleted the requirement of a "speedy" transfer and authorized the adoption of the scheduled admissions policy, the *Alberti* court concluded that the amendments did not relieve the state of its responsibility for the confinement of convicted felons:

> The State of Texas is free to allocate the admissions of felons into the penitentiary in virtually any manner it chooses so long as the allocation does not result in the cruel and unusual punishment of inmates. However, when it becomes clear that convicted felons are being confined in conditions that violate the Eighth Amendment, the relevant inquiry becomes who

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5. *Tex.Gov.Code Ch. 494 (Texas Department of Corrections--contracts)*:

Adopted as part of the 1989 amendments, this chapter authorizes the Board of Corrections to contract with a private vendor *or* a *county* commissioners court for jail space. *See* § 494.001. A private vendor or county under contract with the Board has no authority to compute parole or release dates, award good time, approve furloughs, or reclassify inmates. *See* § 494.004.

6. *Tex.Gov.Code Ch. 499 (miscellaneous matters) Art. 499.006 (transportation of inmates):*

Before its 1989 amendment, this provision stated that the director of the Board of Corrections "shall adopt rules to provide for the safe and speedy transfer of inmates from the counties in which inmates are sentenced to the department." Now, the provision states that the director "shall make suitable provision and regulations for the safe transportation or prisoners from counties where sentenced to the State penitentiary."

7. *Tex.Local Gov.Code Ch. 351 (jails and law enforcement) § 351.041 (sheriff):*

This provision makes the sheriff of each county "the keeper of the county jail."

> is responsible for those inmates. Fortunately, H.B. 2335 [the 1989 amendatory act] provides a clear answer to this inquiry. Section 1.02(a)(1) provides, "The department [TDCJ, formerly TDC] is the state agency with *primary* responsibility for . . . the confinement, supervision, and rehabilitation of felons." Thus, the fact that the State of Texas has "virtually complete freedom to decide who will be responsible" for the confinement of felons provides no shield from liability for the State Defendants in this case because state law clearly places the primary responsibility for the confinement of felons upon them. *See Bush v. Viterna*, 795 F.2d 1203, 1209 (5th Cir. 1986).

The *Alberti* court's reasoning is consistent with that of the only state court to have addressed the issue. After the 1989 amendments, Nueces County and Harris County both filed suit in Travis County, contending that the state still had the responsibility either to promptly remove ready-felons or to reimburse the counties for the costs of their housing. In both cases, the state court ruled for the county on the merits; one case is now on appeal, and the other still before the district court on damages issues. *County of Nueces v. Texas Board of Corrections*, No. 452,071 (Dist.Ct. of Travis County, 126th Judicial Dist. of Texas 1991); *Harris County v. State of Texas*, No. 465,468 (Dist.Ct. of Travis County, 126th Judicial Dist. of Texas, pending).[4] Since our task, as set forth in *Bush*, is to de-

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[4] The reasoning of the state court is best laid out in a letter from the judge to the parties dated May 31, 1990. The court reasoned that the statutory provisions placing responsibility for felons with the state were quite clear. Tex.Pen.Code §§ 12.31-12.34; Tex.Crim.Pro.Code Art. 42.09; Tex.Gov.Code § 499.006. On the other hand, the provision cited by the state, the scheduled admissions policy, was ambiguous. "It neither expressly relieves the state of the duty to take and confine felons nor expressly

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cide who is liable for the violation under *state* law, we find it appropriate to defer to the state courts on the issue.[5]

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places that duty on the counties." The court was also influenced by the awkward effects that in its opinion , the state's interpretation would have:

> 1. H.B. 2335 which places "primary responsibility" for the confinement, supervision and rehabilitation of felons on the Texas Department of Criminal Justice will be rendered meaningless. [citations omitted]
> 2. The statutes cited above which unambiguously require that TDC confine felons will, in effect, be repealed.
> 3. The portions of the court orders which sentence felons to TDC will be meaningless.
> 4. New duties will be placed on the counties which they have never had before possibly in violation of Article 5, § 18(b) of the Texas Constitution. Conversely, the State will be relieved of duties clearly placed on it by statute.
> 5. The taxpayers of the affected counties will have to shoulder a tremendous financial burden which under the unambiguous statutes should be borne by the whole state.

The court also noted that a bill relieving the state of financial responsibility for felons left in county jails was introduced, but failed to pass.

As the county points out, the state is a party to both *County of Nueces* and *Harris County*.

[5] We find no merit in several related arguments urged by the state. For example, the state argues that, under the supremacy clause, "any such state law duty to accept inmates more speedily (if it ever existed) must give way to orders entered by the federal district court in *Ruiz*." The *Alberti* obligation arises from the Eighth Amendment. The consent decree in *Ruiz* must give way to its demands. At any rate, the *Alberti* court specifically found that the state "could have complied with the requirements of the *Ruiz* decree without refusing to accept prisoners."

The state also makes several intent arguments. First, the state points out that "the Very Legislature that passed § 1.02

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2. *The deliberate indifference requirement.*

[5] Our conclusion that state law imposes responsibilities on both the state and the county does not end our inquiry. At the time of the liability hearings before the *Alberti* court, the focus of the parties and the court was on the objective conditions of confinement in the county's jails. *See Rhodes v. Chapman*, 452 U.S. 337, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981); *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978). This circuit had earlier held that "unlike 'conduct that does not purport to be punishment at all' as was involved in *Gamble* and *Whitley*, the Court has not made intent an element of a cause of action alleging unconstitutional conditions of confinement." *Gillespie v. Crawford*, 833 F.2d 47, 50 (5th Cir. 1987) (quoting *Whitley v. Albers*, 475 U.S. 312, 319, 106 S.Ct. 1078, 1084, 89 L.Ed.2d 251 (1986)), vacated on other grounds, 858 F.2d 1101 (5th Cir. 1988). Both the county and the state expressly conceded that excessive overcrowding rendered the conditions of confinement in the county's jails unconstitutional, and each attempted to persuade the court that the other should shoulder full responsibility.

While this appeal was pending, however, the Supreme Court held that prison conditions rise to the level of cruel and unusual punishment only when they are a product of state indifference. In *Wilson v. Seiter*, ___ U.S. ___, ___, 111 S.Ct. 2321, 2325, 115 L.Ed.2d 271 (1991), the Court identified the

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[stating that the state has "primary responsibility" for felons] failed to enact any appropriations that would enable State Defendants to assume responsibility for the care or treatment of convicted felons in local jails." This argument fails to explain the contemporaneous passage of Tex.Gov.Code § 494.001, authorizing the state to contract for jail space with private vendors or counties. Second, the state contends that the Legislature rejected three bills to compensate states for holding ready-felons. But, as the county points out, these "proposed" bills never even reached the floor for a vote.

source of this subjective requirement as "the Eighth Amendment itself, which bans only cruel and unusual *punishment*. If the pain inflicted is not formally meted out as *punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify." In prison conditions cases, like *Alberti*, the requisite intent is "deliberate indifference" as articulated by the Court in *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). *Id.* ___ U.S. at ___, 111 S.Ct. at 2326.[6]

The deliberate indifference requirement of *Seiter* and *Estelle* is not wholly separate from the objective requirement of *Rhodes*. In *Seiter*, the Court explained that the "long duration of a cruel prison condition may make it easier to *establish* knowledge and hence some form of intent." *Id.* at ___, 111 S.Ct. at 2325. Several lower courts, cited in *Seiter*, have found deliberate indifference where prison officials were aware of objectively cruel conditions but failed to remedy them. *See Cortes-Quinones v. Jiminez-Nettleship*, 842 F.2d 556, 560 (1st Cir. 1988); *Morgan v. District of Columbia*, 824 F.2d 1049, 1063 (D.C. Cir. 1987). In *Alberti*, there is little doubt that both the county and the state knew that the conditions of confinement in the county's jails deprived the inmates of basic needs. The county's jails had been under the continuing jurisdiction of the *Alberti* court since 1975, the monitors' reports became increasingly strident after mid-1988, and both the county and the state expressly admitted that he conditions of

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6 In *Seiter*, the Supreme Court stated that, in emergency situations, the requisite intent rises to "acting `maliciously and sadistically for the purpose of causing harm.'" *Seiter*, ___ U.S. at ___, 111 S.Ct. at 2321. The state argues that we should apply this higher standard because of a purported clash between the state's responsibility to ready-felons in the county's jails and its responsibilities under the *Ruiz* decree. We think it clear, however, that the Court was concerned with short-term emergencies where prison officials must act "in haste, [and] under pressure." *Id.* (quoting *Whitley v. Albers*, 475 U.S. 312, 320, 106 S.Ct. 1078, 1084, 89 L.E.d2d 251 (1986).

confinement were objectively unconstitutional during the liability hearings.

In deciding whether the county and the state were deliberately indifferent to the needs of the plaintiffs, however, we must also consider any relevant constraints. As Justice Scalia explained, "whether [conduct] can be characterized as 'wanton' depends upon the constraints facing the official." *Seiter*, ___ U.S. at ___, 111 S.Ct. at 2326. *LaFaut v. Smith*, 834 F.2d 389 (4th Cir. 1987), written by former Justice Powell and cited extensively in *Seiter*, is instructive. In *LaFaut*, a paraplegic prisoner alleged that prison officials had denied him adequate toilet facilities and necessary physical therapy in violation of the Eighth Amendment. In reviewing the district court's findings, Justice Powell noted that, although LaFaut specifically informed prison officials that his toilet facilities were inadequate, they made no attempt to modify the facilities for two months and, when their initial attempt failed, waited another month before transferring LaFaut to a cell with adequate facilities. Similarly, although LaFaut repeatedly requested physical therapy and official medical reports confirmed the need for therapy, he waited two months for minimal motion therapy and eight months for a transfer to an institution with adequate therapy.

Justice Powell concluded that, because there was no reason for the delays, the prison officials had been deliberately indifferent to LaFaut's needs:

> There is nothing in the record before us . . . to justify the inordinate delays in accommodating appellant's needs in light of the practicality and availability of various solutions. Prison officials should not ignore the basic needs of handicapped individuals or postpone addressing those needs out of mere convenience or apathy. As appellee Hambrick was the responsible official in charge of Butner, and she was fully advised both of the

> inhumane conditions of appellant's confinement and the failure to provide him with needed therapy we concluded that her neglect constituted "deliberate indifference" and therefore violated the Eighth Amendment.

Id. at 394.

The state contends that its actions were not deliberately indifferent but instead necessitated by the *Ruiz* decree and the over-crowding problems in its own prisons. However, the *Alberti* court specifically found that:

> State Defendants could have complied with the requirements of the *Ruiz* decree without refusing to accept prisoners. Federal authority did not require them to refuse to accept inmates from county jails. The most obvious alternative would have been to timely build new prison facilities. The Court described other alternatives [such as contracts with other suitable facilities or early releases as authorized by the Texas Prison Management Act, Tex.Rev.Stat.Ann. Art. 6184*o*] in its May 12, 1989 Memorandum and Order.

There is no doubt that the relevant state officials knew that ready-felons were being backlogged despite the objectively cruel conditions in the county's jails. Yet the state chose to leave them in the jails. This is strong if not compelling evidence of deliberate indifference to the plight of these ready-felons, and it is only accented by the alternatives available to the state. As found by the *Alberti* monitors, the state's management of ready-felons in Harris County "in essence . . . ignore[d] those state prisoners. . . . " Significantly, the state could have housed prisoners in a variety of ways. Even housing them under conditions of a military bootcamp would not touch the Eighth Amendment. Indeed, a tent city would be far superior to the conditions in the county's jails. The state cannot turn away from

the use of such common sense solutions by pointing to the *Ruiz* decree. The district court explicitly found that the decree was no impediment; and in any event, the *Ruiz* decree could not legally impede such plain responses, at least to the extent its constraints were not themselves required by the Constitution.

Nor does this record offer substantial evidence that the state's actions were constrained by legislative refusal to fund the only means by which the state could have relieved the county. Before *Seiter*, it was well established in this circuit that "inadequate funding will not excuse the perpetuation of unconstitutional conditions of confinement." *Smith v. Sullivan*, 611 F.2d 1039, 1044 (5th Cir. 1980); *see also Gates v. Collier*, 501 F.2d 1291, 1319-20 (5th Cir. 1974). Other circuits have found deliberate indifference over allegations of inadequate funding. *See Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986); *Ancata v. Prison Health Services, Inc.*, 769 F.2d 700, 705 (11th Cir. 1985); *Wellman v. Faulkner*, 715 F.2d 269, 274 (7th Cir. 1983). The issue is assured currency by the intent requirement of *Seiter* and that opinion's leave of it. *See Seiter*, ___ U.S. at ___, 111 S.Ct. at 2326. We need not address the issue here in the absence of findings pointing the finger at the legislature. In short, however, this record leaves us skeptical of the assertion that a recalcitrant legislature was the culprit.

We would, by necessity, affirm a finding that the state was deliberately indifferent. Indeed, such a finding on this record would be virtually unassailable. There is understandably no such finding, however, because deliberate indifference was not an issue when the *Alberti* court ruled. As strong as the case is, we are reluctant to conclude that a finding of deliberate indifference is compelled as a matter of law. Factfinding is a province of the district court. We therefore remand for the appropriate findings and leave to the district court the decision to take any further evidence.

[6] The county also argues that its actions were not deliberately indifferent after *Seiter*. Again, there is no finding,

but here the record offers some evidence of arguably formidable constraints. The *Alberti* court noted in its September 25 findings of fact and conclusions of law that, until the state began refusing ready-felons, "it appeared that a spirit of cooperation between Plaintiffs and County Defendants would eventually led to full compliance with all Court orders with a minimum of direct judicial intervention." In June of 1987, the county's jails were only five percent over capacity, and the number of ready-felons in the county's jails had regularly fluctuated between 100 and 200 for several years. Upon the state's decision to backlog ready-felons, their numbers quickly jumped to 512 in September of 1987, 798 in December of 1987, 2100 in December of 1988, and 3420, or 45% of the total population of 8086, by the time of the liability hearing in August of 1989.

In light of the increase in the population of ready-felons over such a short period of time, we cannot conclude from the record as it now stands that the county has deliberately ignored the needs of its inmates or that its delay in accommodating the over-crowding has been "inordinate." *LaFaut*, 834 F.2d at 394. By contrast, any increase in the population of state prisoners, including ready-felons, was expressly contemplated by the state. The 95% "crowding stipulation" in *Ruiz*, signed by the state, provides that:

> The parties further acknowledge that certain conditions and eventualities are within the contemplation of the parties. These include the possibility that TDC may experience a substantial increase or decrease in its population.
> . . .

See Ruiz v. Lynaugh, 811 F.2d 856 (5th Cir. 1987).

While the huge jump in the population of ready-felons might weigh against a finding of deliberate indifference, other facts could weigh in favor of such a finding. For example, the *Alberti* court found problems with the jails' plumbing,

ventilation, fire safety, supplies, food service, and medical care. The *Alberti* court also found that the constitutional capacity of the county's jails equalled their designed capacity and that "[e]ven if all TDC-ready prisoners were removed from the jail, the population would still exceed design capacity by approximately 400 inmates." The 1975 consent decree could also factor into the county's liability. We thus remand for the appropriate finding and, again, leave to the *Alberti* court whether it will conduct further hearings or consider additional evidence.

[7] Although we do not decide the liability question, one remaining issue is relevant to the remand. The county argues that the *Alberti* court erred in equating the constitutional capacity of its jails with their design capacity. But, in its September 25 findings of facts and conclusions of law, the court expressly recognized its obligation to consider the "totality of the conditions." And its findings contemplate a number of factors in addition to design capacity--the fact that thousands of inmates were sleeping on the floors, the physical design of the cellblocks, the inability of the staff to control the inmates, the increase in disciplinary violations, plumbing problems, poor ventilation, the absence of a sprinkler system or a second means of egress in the event of a fire, supply shortages, insufficient food service, inadequate medical care, and the outbreak of a pneumococcal infection. In sum, then, the finding was not clearly erroneous.

C. *Remedial issues:*

[8] The state's attacks on the remedial orders are all jurisdictional. First, the state argues that the orders violate the Eleventh Amendment because they enforce state law against the state, citing *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 97 L.Ed.2d 67 (1984), *Bush v. Viterna*, 795 F.2d 1203 (5th Cir. 1986), and *Kelley v. Bd. of Educ. of Nashville and Davidson County*, 836 F.2d 986 (6th Cir. 1987). The state contends that the county is fully responsible for

the conditions in its jails and that any duty the state might have to promptly remove ready-felons arises only under state law. While we agree with the state's premise, we reject its assumption that its duties arise only under state law. As discussed above, in *Stewart*, 669 F.2d at 333, a case involving a challenge to overcrowded conditions in Mississippi county jails, this court found the state partially responsible for the unconstitutional conditions because "state officials cannot shed their constitutional obligations by putting state prisoners in county jails." *Accord Benjamin*, 803 F.2d at 46; *Tate*, 735 F.2d at 986. Although *Stewart* predated *Pennhurst*, both *Benjamin* and *Tate* rejected *Pennhurst* arguments in identical situations. As reasoned by the Second Circuit:

> This argument [*Pennhurst*] must be rejected, however, for the reason that the prisoners whom [the state] refuses promptly to accept into its prisons are not those of some other state, country, or planet, but its own prisoners who have been convicted by New York state courts of New York felonies. The State cannot therefore wash its hands of its *federal constitutional responsibility* for the detention conditions of such prisoners because they are temporarily housed in City facilities or because a New York statute requires the State to accept them "forthwith."

Benjamin, 803 F.2d at 51 (emphasis in original). In sum, because the state is responsible for ready-felons, *Pennhurst*, *Bush*, and *Kelley*, are distinguishable.[7]

[9] The state also urges that the orders violate the Eleventh Amendment because they exact monetary rather than

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[7] In *Kelley*, cited extensively by the state, Tennessee was not a present constitutional violator when the order against it was entered. *See Kelley*, 836 F.2d at 989-90, 993-94.

prospective relief. Like the *Pennhurst* argument, however, this contention mischaracterizes the orders--the plaintiffs established a federal constitutional violation, and the state is a responsible party. The required payments are thus "a necessary consequence of compliance in the future with a substantive federal question determination." *Edelman v. Jordan*, 415 U.S. 651, 668, 94 S.Ct. 1347, 1358, 39 L.Ed.2d 662 (1974); *see also Milliken v. Bradley*, 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977); *Williams v. Edwards*, 547 F.2d 1206, 1212-13 (5th Cir. 1977); *Jenkins v. Missouri*, 807 F.2d 657 (8th Cir. 1986), *rev'd in part on other grounds*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). *Kelley*, cited extensively by the state, is distinguishable--the order remedying the violation in *Kelley* ran only against the county, and the state was not a current constitutional violator, yet the county sought reimbursement from the state for the costs of the remedial order. *See Kelley*, 836 F.2d at 990-94.[8]

[10] Finally, the state argues that the *Alberti* court should have abstained from ordering it to pay for the housing of ready-felons in other county's jails pending the ultimate resolution of the state litigation, discussed above. *County of Nueces v. Texas Board of Corrections*, No. 452,071 (Dist. Ct. of Travis County, 126th Judicial Dist. of Texas 1991); *Harris County v. State of Texas*, No. 465,468 (Dist. Ct. of Travis County, 126th Judicial Dist. of Texas, pending). But none of the abstention theories cited quite fit the facts of *Alberti*. The *Alberti* court has already decided the federal issue; the state issue implicates only the remedy. Moreover, in resolving the

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8 The state also makes a general federalism argument, suggesting that "[a] federal court has no jurisdiction (no power) to act as arbiter between different levels of a State's government that are in dispute." Again, this argument mischaracterizes the action; the state is responsible for a federal constitutional violation. Unless the plaintiff were to be left with no remedy, the *Alberti* court had to apportion liability between the state and county. The relevant federal question, then, is the Eighth Amendment issue; the dispute between the state and the county implicates only the remedy.

state issue, the *Alberti* court simply adopted the approach of the only state court to have decided the issue pending a decision by a higher state court. *See County of Nueces*, No. 452,071 (holding that the state must compensate the county $40 per day for each ready-felon left in the county's jails more than seven days after sentencing).

In sum, the state courts should eventually determine whether the state or the county is responsible for ready-felons in the county's jails. The *Alberti* court's assessment of costs was "tentative" and "contingent on . . . the outcome of pending litigation in State courts over the allocation of costs for maintaining felons ready for transfer to the TDCJ-ID in county facilities." The issue, then, is whether the state or the county should pay for the housing of ready-felons in other county jails pending the resolution of the state litigation. If the state is found liable on remand, plaintiffs are entitled to their long-awaited remedy. The state's arguments seem to assume that the county should pay all housing costs until the state courts decide otherwise. But the presumption is baseless. Assuming the findings of state liability, the *Alberti* court chose the best available course in modeling relief on *County of Nueces*.

Because the liability findings against the county are far more problematic, we do not address the remedial issues raised by the county.

D. *Procedural issues:*

1. *The jurisdiction of the Alberti court to unilaterally impose the February 7 order.*

[11] The state does not argue, as it did in an earlier request for mandamus, that the February 7 order violates our opinion in *In re Clements*, 881 F.2d 145 (5th Cir. 1989). Instead, the state contends that the *Alberti* court was without jurisdiction to unilaterally impose the order because, in its September 25 findings of fact and conclusions of law, the

Alberti court transferred both the county's third-party complaint and the plaintiff's complaint against the state to the *Ruiz* court. In *In re Clements*, we transferred to the *Ruiz* court

> so much of the *relief* portion of the third-party complaint as seeks an injunction ordering our individual petitioners (in their official capacities) to receive or take prisoners into TDC confinement or to otherwise take action in the operation or management of TDC-operated confinement facilities.

In re Clements, 881 F.2d at 154. The September 25 transfer by the *Alberti* court was arguably broader than required by *In re Clements*; upon finding the state liable, the *Alberti* court

> ORDERED that County Defendants' third-party complaint and Plaintiffs' supplemental complaint are TRANSFERRED to the Honorable William Wayne Justice for proceedings in accordance with the mandamus opinion of the Fifth Circuit of Appeals entered in this case.

The *Alberti* court retreated in its February 7 order, however, where it stated:

> None of the remedial measures encompassed in this order affect the population cap imposed on TDCJ institutions as a result of the various orders and agreements in the *Ruiz* case, nor do they require the supersedence of the statutorily-based allocation formula adopted by the State defendants to protect the integrity of the *Ruiz* orders and agreements.

As evidenced by his separate February 7 *Ruiz* opinion, Judge Justice disagreed.

The cases cited by the state involve inter-district transfers. The plaintiffs contend that an intra-district transfer, by contrast, does not divest the transferor of jurisdiction. They point to the fact that both the *Alberti* and the *Ruiz* courts are a party of the Southern District of Texas and conclude that Judge DeAnda had the jurisdiction to impose the remedy regardless of the transfer. "Jurisdiction is lodged in a court, not in a person." *In re Brown*, 346 F.2d 903, 910 (5th Cir. 1965).

We need not address the distinction urged by the plaintiffs because we read the transfer order by the *Alberti* court to transfer only limited jurisdiction to the *Ruiz* court; the later joint hearings and joint orders reflect an intent to *share* jurisdiction over the third-party complaint and supplement complaint rather than to transfer jurisdiction entirely. In *In re Clements*, we suggested that "minor or indirect" effects on the state's prison system were within the sphere of *Alberti*, and in addition, saved to *Alberti* "plaintiffs' several motions in that case for orders establishing a limit or 'cap' on the number of inmates confined in the Harris County jail facilities (either as a whole or as to individual units)." *In re Clements*, 881 F.2d at 153. These reservations suggest that the February 7 order fell within the realm reserved to the *Alberti* court. Reading *In re Clements* to preclude an *Alberti* order with *any* effect on the state would leave the *Alberti* court powerless to remedy the overcrowding in the county's jails, since ready-felons account for such a large percentage of the jails' population.

2. *Procedural due process.*

The state also makes a general due process argument, suggesting that the *Alberti* court erred in issuing the February 7 order without a hearing. Given the large number of hearings held in *Alberti*, it is difficult to take this argument seriously. At any rate, it is clear from the record that the order was the direct product of a hearing held on October 22, 1990. The ordering schedule for the October 22 hearing specifically announced that

one of its purposes was to consider "the utilization of facilities in nearby counties which may have available jail space."

3. *The order of relief against the Texas Board of Pardons and Paroles.*

[12] The state next argues that the *Alberti* court erred in ordering relief against the Texas Board of Pardons and Paroles because the Board was not named a party to the action. The state emphasizes that, under Texas law, the Board is an independent agency. *See* Tex.Const. Art. IV § 11; Tex.Code Crim.Pro. Art. 42.18 § 1. In 1989, however, the Texas Legislature abolished the Board and transferred its duties to the Department of Criminal Justice, successor to the Department of Corrections. *See* Tex.Gen. & Special Laws 1989, Reg. Sess., Ch. 785 § 1.20. Because the Board of Pardons and Paroles is now part of the Department of Criminal Justice, we find no error.

4. *The supplemental complaint.*

Finally, the state argues that the *Alberti* court erred in allowing the plaintiffs to file a supplemental complaint against the state after the liability trials. As the county and plaintiffs point out, however, the state was a party to the action, a third-party defendant, during the trial. The state contends that its trial strategy would have been different had it been an actual defendant, but it does not explain why. Because the state has not sufficiently demonstrated prejudice, we find no error.

5. *Pending motions.*

On April 23, 1991, the *Alberti* court entered an order continuing its February 27 order in effect through September 15, 1991. The state moved to vacate the order, and the *Alberti* court denied the motion on May 1, 1991. On May 9, 1991, the state noticed its appeal of the April 23 order and moved this court to consolidate its appeals. The plaintiffs joined the motion

to consolidate the appeals, but the county moved the *Alberti* court to vacate the April 23 order on May 10, 1991, and argued that its motion to vacate rendered the state's appeal of the April 23 order premature. On May 20, 1991, the county conceded that its motion to vacate was untimely under Fed.R.Civ.P. 59(b), noticed its own appeal of the April 23 order, and requested that this court consolidate the appeals. Both the state and the county filed additional notices of appeal after the *Alberti* court denied the county's motion to vacate on June 4, 1991.

On May 28, 1991, the *Alberti* court entered an order requiring the sate to deposit an additional $1,000.000 with its registry by June 10, 1991. The state moved to vacate the order on June 3, 1991, demanding an answer by June 4, 1991. On June 5, 1991, when the *Alberti* court failed to "promptly" respond to the motion to vacate, the state moved this court to stay the order, arguing that the *Alberti* court had "effectively" denied its motion to vacate. The state also noticed its appeal of the May 28 order and moved this court to consolidate its appeals. The county opposed the stay, arguing that the state's motion presented the very same issues rejected by this court when we denied the state's motion to stay the February 7 order.

We grant both motions to consolidate the appeals and adopt the briefs already filed. Finally, we grant the motion of the state to consolidate its latest appeal filed on July 10, 1991, and its most recent petition for writ of prohibition docketed under cause number 91-2801 with the above referenced appeals, and to adopt the briefs on file.

In sum, we remand the case for the limited purpose of allowing the district court to enter findings regarding the issue of deliberate indifference, now required by *Seiter*. We leave to the discretion of the district court whether to take additional evidence or conduct any further proceedings in that court regarding this issue. We stay the orders of the district court which are the subject of this appeal, pending the district court's findings regarding deliberate indifference. The stay will abide

the district court's findings on the issue, vacating automatically, and without the need of a further order of this court should the district court find that the state was deliberately indifferent.

REMANDED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Lawrence R. ALBERTI, et al.,
Plaintiffs-Appellees,

v.

The SHERIFF OF HARRIS COUNTY,
TEXAS, et al., Defendants-Third Party
Plaintiffs-Appellants, Appellees,

In re Ann RICHARDS, the Governor
of Texas, et al., Third Party
Defendants-Appellants.

Nos. 90-2441, 90-6034, 91-2274
91-2801, 91-2946 & 91-6101.

Appeals From the United States District Court for the Southern
District of Texas

ORDER DENYING PETITION FOR WRIT OF
PROHIBITION AND STAY
AND PETITION FOR REHEARING

Before REAVLEY, HIGGINBOTHAM and DUHE', Circuit Judges.

BY THE COURT:

The State of Texas has petitioned for panel rehearing and has also requested that we order the district court not to

disburse $2,000,000 deposited by the state in the registry of the court.

The state argues that the legislature, by enacting H.B. 93, and the parties by their settlement agreement, have changed the legal relationship between the state and counties in ways that require reconsideration of our earlier opinion and warrant a stay of any disbursal below. We are unpersuaded and deny both the application for stay or writ of prohibition and petition for rehearing.

First, we are not persuaded that the Texas Legislature attempted to speak to the historical relationship between the state and its counties in the handling of prisoners. The state argues that H.B. 93 made clear that the duty owed to the counties that we found was, in fact, never owed. The state points to the statutory language that: "The legislature declares that until September 1, 1995 the institutional division shall continue to perform its duty to accept inmates only as provided by the allocation formula established under § 499.071." H.B. 93, § 11.02 (emphasis supplied). The argument continues that this language "makes clear" that Texas counties have always had the duty to house prisoners contracted for by the state in this suit; that H.B. 93 is a legislative ratification of the Texas Department of Criminal Justice's interpretation of its and the county's liability.

H.B. 93 also provided, however, that the counties were to continue to perform their duty to confine and maintain inmates at the county's own expense until the date the inmate is accepted into the institutional division, unless the state suits were settled by written agreement. So, the word continue could describe a time from August 29 forward, or it could describe a legislative view of both current and past legal relationships.

The state also points to certain legislative history; that the legislation which failed in the first called session provided for the payment of costs of transferring inmates to other

facilities from February 7, 1991. That legislation failed when the Senate refused to concur. Relatedly, the state points out that there ware no appropriations for paying the costs of transfers made before those ordered by the Jails Standards Commission after October 1, 1991. The sum of these events, the state argues, is that the legislature did not intend that the state would pay for "earlier debt." And, of course, the state says we should not meddle, because to do so would step hard on principles of federalism. We find this argument unpersuasive.

The federal court orders addressing the liability of the state for certain county prisoners were a lion in the street when the Texas Legislature addressed the problem in August 1991. An effort by the state to undo those orders by a declaration of state law or otherwise would have presented its own set of problems. Under these circumstances, we are persuaded that if the Texas Legislature had intended the actions now claimed for it by the state's lawyers, it would have said so in clear language. We are not persuaded that the legislature would have left such a large undertaking to inference and innuendo. The same is true for the later "settlement", conspicuous for its silence over the obligations of the state for costs incurred before August 29, 1991.

The petition for writ of prohibition, stay and panel rehearing are DENIED.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-2810

IN RE: WILLIAM P. CLEMENTS, JR., ET AL.,

Petitioners.

On Petition for Writ of Mandamus

Before JOLLY, HIGGINBOTHAM, and JONES, Circuit Judges.

BY THE COURT:

We are asked by Governor Clements and other state officials, through Jim Mattox, the Attorney General of Texas, for a stay of certain orders of the district court pending decision upon their petitions for writ of prohibition and mandamus. Petitioners seek relief from orders of the district court setting population caps for the number of inmates in the Harris County Jail. Under those orders, we are told, convicted felons will be released when the cap of 1,350 convicted felons is exceeded for 15 straight days. Petitioners urge that these releases will occur within twenty-four hours even though persons guilty of less serious offenses and pretrial detainees, all who pose less threat to the public safety, are available for release.

Petitioners' request for reconsideration of the district court's orders and for stay were denied on September 21, 1990.

We are persuaded that in the interest of justice, the application for stay of the 1,350 cap established by the Alberti court should be granted pending further order of this court. Counsel opposite will promptly reply to the petition, but, in any event, on or before October 1, 1990.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, et al.,	§	
Plaintiffs,	§	
v.	§	CIVIL ACTION
	§	NO. H-72-1094
SHERIFF OF HARRIS COUNTY, et al.,	§	
Defendants.	§	

ORDER

This case is before the Court on State Defendants' motion for a hearing on the current constitutional capacity of the Harris County Jail. Because it is not possible to schedule such a hearing before January, it is hereby

ORDERED

that the motion is DENIED at this time. Should the Court later determine that a full evidentiary hearing is necessary, the Court will advise counsel of a briefing and hearing schedule.

IT IS FURTHER ORDERED that pending such a hearing or other order of this Court addressing constitutional capacity, the Court's prior ruling that constitutional capacity is design capacity remains in full force and effect.

SIGNED this 2nd day of December, 1991.

_____

Chief Judge
United States District Court

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI,	§	
et al.,	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION
	§	NO. H-72-1094
SHERIFF OF HARRIS	§	
COUNTY, et al.,	§	
Defendants.	§	

ORDER

This case is before the Court on County Defendants' motion to extend the September 11, 1991 order and motion that the state defendants be required to deposit additional funds into the Court's registry. State Defendants have filed a written response to the motions. Because certain events outside the Court's control have delayed the entry of a permanent remedial decree as contemplated by the September 11 order, it is hereby

ORDERED

that the Court's order of September 11, 1991 is extended until altered by a subsequent permanent remedial order or other order of the Court. The Court notes that, pending a permanent remedial decree, its prior holding that the constitutional capacity of the jail facility is its design capacity continues in effect, establishing a current constitutional capacity of the Harris County jail facility at 8,698.

IT IS FURTHER ORDERED that the State Defendants shall deposit into the registry of the Court, fund 4:72cv1094-02, on or before December 16, 1991, the sum of three million dollars ($3,000,000.00) from which the County Defendants shall be authorized to pay up to $40.00 per day for each prison-ready felon transferred from the Harris County Jail Facilities to other Texas County detention facilities.

SIGNED this 25th day of November, 1991.

_____

Chief Judge
United States District Court

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, ET AL., Plaintiffs,	§	
VS.	§	
THE SHERIFF OF HARRIS COUNTY, TEXAS, ET AL., Defendants/ Third Party Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. 72-H-1094
ANN RICHARDS, ET AL., Defendants/ Third-Party Defendants.	§	

ORDER

BE IT REMEMBERED that on this date came on to be heard COUNTY DEFENDANTS' Motion to Withdraw $2,000,000 and all accrued interest from the Court Registry, and for Expedited Consideration, said $2,000,000 having been deposited by the State Defendants on September 30, 1991, and the Court, after considering the motion filed herein, is of the opinion that the COUNTY DEFENDANTS' motion should be granted:

It is hereby ORDERED, ADJUDGED and DECREED that the COUNTY DEFENDANTS' Motion to Withdraw $2,000,000 and all Accrued Interest from the Court Registry, for the housing of and caring for prisoners ready for transfer to TDCJ-ID, all of whom were transferred in accordance with this Court's Orders, is hereby approved and GRANTED.

The Court ORDERS that the Clerk shall issue a check drawn on the Court's Registry to HARRIS COUNTY, TEXAS, in the amount of $2,000,000, together with all accrued interest thereon, and release the check to:

Harris County, Texas
c/o Harris County Attorney's Office
Attention: Harold M. Streicher
1001 Preston, Suite 634
Houston, Texas 77002
(713) 221-7164

SIGNED this the 25th day of October, 1991.

_____

JAMES DeANDA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI; ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
VS.	§	CIVIL ACTION
	§	NO. H-72-1094
THE SHERIFF OF HARRIS COUNTY, TEXAS; ET AL.,	§	
	§	
Defendants/ Third Party Plaintiffs,	§	
	§	
VS.	§	
	§	
ANN RICHARDS; ET AL.,	§	
	§	
Defendants/ Third-Party Defendants.	§	

ORDER

This case is before the Court on county defendants' second motion to require state defendants to deposit additional funds into the Court registry. The Court, after considering the motion filed herein, is of the opinion that the county defendants' motion should be granted. Accordingly, it is hereby

ORDERED that the county defendants' second motion to require state defendants to deposit additional funds

into the Court registry is GRANTED, and state defendants are hereby

ORDERED to deposit $2,000,000.00 into the Court registry on or before September 30, 1991, from which the county defendants shall be authorized to pay up to $40.00 per diem for each prison-ready felon transferred from the Harris County Jail Facilities to other Texas county detention facilities.

SIGNED this the 13th day of September, 1991, at Houston, Texas.

JAMES DeANDA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, ET AL., Plaintiffs,	§	
VS.	§	
THE SHERIFF OF HARRIS COUNTY, TEXAS, ET AL., Defendants/ Third Party Plaintiffs,	§	
VS.	§	CIVIL ACTION
	§	NO. 72-H-1094
ANN RICHARDS, ET AL., Defendants/ Third-Party Defendants.	§	

ORDER

BE IT REMEMBERED that on this date came on to be considered COUNTY DEFENDANTS' Motion to Withdraw $1,000,000.00 and all accrued interest from the Court Registry, and for expedited Consideration, said $1,000,000.00 having been deposited by the State Defendants on August 12, 1991, and the Court, after considering the motion filed herein, if of the opinion that the COUNTY DEFENDANTS' motion should be granted:

It is hereby ORDERED, ADJUDGED and DECREED that the COUNTY DEFENDANTS' Motion to Withdraw $1,000,000.00 and all accrued interest from the Court Registry, for the housing and caring for prisoners ready for transfer to TDCJ-ID, all of whom were transferred in accordance with this Court's Orders, is hereby approved and GRANTED.

The Court ORDERS that the Clerk shall issue a check drawn on the Court's Registry to HARRIS COUNTY, TEXAS, in the amount of $1,000,000.00, together with all accrued interest, on STATE DEFENDANTS' deposits of $750,000.00 and $1,000,000.00 into the Registry of the Court, and release the check to:

Harris County, Texas
c/o Harris County Attorney's Office
Attention: Harold M. Streicher
1001 Preston, Suite 634
Houston, Texas 77002
(713) 221-7164

SIGNED this the 13th day of September, 1991.

_____

JAMES DeANDA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, ET AL., PLAINTIFFS	§	
VS.	§	C. A. NO. H-72-1094
SHERIFF OF HARRIS COUNTY, ET AL., DEFENDANTS.	§	

ORDER

According to the report of the Fact-Finding Special Master, the County defendants first began to occupy their new detention facility, the so-called 701 Building, on July 31 when 24 worker-inmates were moved into the facility. As of September 10, 1991, 1,250 inmates were housed in the new facility, and the County defendants were well into the implementation of a phased-in occupation of the 701 Building that envisions the full utilization of that institution by the end of October, 1991. The County defendants anticipate housing 2,000 inmates in the 701 Building by September 19, 1991 and moving in an additional 500 prisoners weekly until the facility is full. Thus, by the end of October, the County defendants expect to have available in their correctional system approximately 8,696 beds (3,505 in the Franklin Street Jail, 776 in the Humble Detention Center, 415 in the renovated 301 Building, and about 4,000 in the new 701 Building).

On September 10, 1991, however, the County defendants also had housed in Harris County facilities and 13 other county facilities across the State of Texas a total

population of 9,600 prisoners. Of that total, 2,149 were felons ready for transfer to the Texas Department of Criminal Justice (TDCJ), who have been relocated from Harris County detention facilities to jails in other counties, leaving a population of 5,046 County prisoners and 2,405 TDCJ-ready felons incarcerated in Harris County facilities.

Presently outstanding orders of this Court require the State defendants to pay up to $40.00 a day per inmate to house TDCJ-ready prisoners moved out of Harris County to other County jails to keep the overall population of Harris County facilities, excluding the 701 Building, within an overall cap of 6,300 prisoners. Such payments were to continue until the opening by Harris County of its new 701 Building, scheduled for September 15, 1991, at which time the Court was to enter a new and permanent remedial decree.

The County defendants' plan for the gradual occupation of their new facility seems reasonable in light of both the security concerns and the multiple complexities associated with the construction and opening of a massive new correctional facility. The State defendants, therefore, will continue to be liable for the payment of the daily cost of housing TDCJ-ID-ready inmates in other County jails until October 31, 1991. The County defendants, however, are directed to occupy fully and expeditiously their new facility and to complete that occupation by no later than October 31, 1991; to maintain the population of their other facilities at levels currently mandated (6,300) and to return or reduce by attrition (i.e., through transfer, pursuant to the allocation formula, to TDCJ or parole in absentia) TDCJ-ready felons transferred to other County facilities. Harris County must move to occupy 100% of all of the beds in all of its detention facilities, present and future, as quickly as possible, and do all in its power, consistent with the orders of this Court, to lessen the financial burden on the State defendants for housing TDCJ-ready prisoners in outlying counties.

Meanwhile, parties have sought, thus far unsuccessfully, to extend the time within which they must file materials and summaries to the Special Master for inclusion in his report to the Court on Harris County sentencing patters and practices. The Special Master reports that he has not yet completed his review of the voluminous materials submitted by the State and County defendants, and that the County defendants are still processing additional data sought from and recently provided by the State defendants. To allow the presentation of all relevant, useful evidence, the State and County defendants are given until October 1, 1991 to provide the Special Master with any additional materials pertinent to his study, while the Special Master is directed to submit his report to the Court no later than October 15, 1991.

After the Special Master has filed his report with the Court, parties will be given an opportunity to file relevant objections, and the Court will determine whether further hearings are required.

IT IS SO ORDERED.

Signed this 11th day of September, 1991.

_____

Chief Judge
United States District Court

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, et al.,	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION
	§	NO. H-72-1094
	§	
SHERIFF OF HARRIS COUNTY, et al.,	§	
	§	
Defendants.	§	

FINDINGS OF FACT AND ORDER

This case is before the Court on remand from the United States Court of Appeals for the Fifth Circuit for findings regarding the issue of deliberate indifference on the part of the State and/or County defendants as now required under Wilson v. Seiter, _____ U.S. _____, 59 U.S.L.W. 4671 (June 17, 1991). Because of the emergency nature of the current overcrowding and medical conditions in the Harris County jail facilities, the Court considers it imperative that these findings be made immediately. Consequently, having reviewed the record in this case, the Supreme Court opinion in Wilson v. Seiter, and the July 25, 1991 opinion of the Fifth Circuit, the Court finds that the State defendants' and, to a much lesser degree, the County defendants' awareness of the extremely cruel conditions in the county facilities and their failure to take steps to remedy those conditions constitutes deliberate indifference as required by Seiter. The Court notes however, that the new County jail facility is scheduled to open next month. Once that facility becomes operational, the Court will revisit the issue of whether

the County defendants have any continuing liability in this case or whether they have taken all possible steps to correct the overcrowding and medical care problems in the Harris County jail system.

In accordance with the July 25 opinion of the Fifth Circuit, all prior orders of this Court which were previously stayed pending appeal are again in full force and effect upon entry of this order. Therefore, State defendants are directed to deposit within 48 hours of receipt of this order one million dollars ($1,000,000.00) into the Registry of the Court, fund 4:72cv1094-02. Additionally, the data and reports required by the Court's order of July 8, 1991 are due on or before August 12. As previously ordered by the Court, the parties are admonished that timely compliance with prior orders of the Court is imperative.

IT IS SO ORDERED.
SIGNED this 7th day of August, 1991.

_____

Chief Judge
United States District Court

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, ET AL., Plaintiffs,	§	
VS.	§	
THE SHERIFF OF HARRIS COUNTY, TEXAS, ET AL., Defendants/ Third Party Plaintiffs,	§	
VS.	§	CIVIL ACTION
	§	NO. 72-H-1094
ANN RICHARDS, ET AL., Defendants/ Third-Party Defendants.	§	

ORDER

BE IT REMEMBERED that on this date came on to be considered COUNTY DEFENDANTS' Motion to Withdraw $750,000.00 from the Court Registry, and the Court, after considering the motion filed herein, is of the opinion that the COUNTY DEFENDANTS' motion should be granted:

It is hereby ORDERED, ADJUDGED and DECREED that the COUNTY DEFENDANTS' Motion to Withdraw $750,000.00 from the Court Registry, for the housing and caring for prisoners ready for transfer to TDCJ-ID, all of whom

were transferred in accordance with this Court's Orders, is hereby approved and GRANTED.

The Court ORDERS that the Clerk shall issue a check drawn on the Court's Registry to HARRIS COUNTY, TEXAS, in the amount of $750,000.00, and release the check to:

Harris County, Texas
c/o Harris County Attorney's Office
Attention: Harold M. Streicher
1001 Preston, Suite 634
Houston, Texas 77002
(713) 221-7164

SIGNED this the 7th day of August, 1991.

JAMES DeANDA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, ET AL., PLAINTIFFS	§	
VS.	§	C. A. NO. H-72-1094
SHERIFF OF HARRIS COUNTY, ET AL., DEFENDANTS.	§	

ORDER

In view of the escalating problem of overcrowding in the Harris County detention facilities and in anticipation of the hearing to be held following the report of he Special Master as directed by the Court in its order of June 10, 1991, it is hereby

ORDERED

as follows:

(1) The scope of the Special Master's analysis and report shall include the effect on jail population of parole policies of the Texas Department of Criminal Justice ("TDCJ"), population caps at TDCJ, and any other factors that may impact on the jail overcrowding. The deadline for the Special Master's report is extended to August 31, 1991.

(2) In lieu of discovery, all parties shall submit to the Special Master on or before August 10, 1991 any statistical data, detailed reports of expert witnesses or

alternatively, detailed summaries of such expert's opinions and the bases therefor and a summary of the testimony of each witness to be called for the hearing relating to the analysis and report being prepared by the Special Master pursuant to the Order as amended by paragraph (1).

Any evidence not disclosed as required by Paragraph (2) of this Order shall be excluded by the Court unless good cause for the noncompliance is shown.

SIGNED this 8th day of July, 1991.

James DeAnda
Chief Judge
United States District Court

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, ET AL., PLAINTIFFS	§	
VS.	§	C. A. NO. H-72-1094
SHERIFF OF HARRIS COUNTY, ET AL., DEFENDANTS.	§	

ORDER

The population of Harris County detention facilities is again assuming alarming proportions. As of May 31, 1991, 7877 prisoners were housed in the County's various facilities, while another 645 are currently housed in other county jails around the State. The monitors report that the excess of felony commitments in Harris County to the Texas Department of Criminal Justice (TDCJ) over the number of felons removed from county facilities through transfer to TDCJ or other expedited parole processes has been running at an average of over 80 prisoners a week since early February. This means that when the County's massive new jail opens in September, with its additional 3800 beds, the defendants will still be about ten percent over the design capacity of their entire existing detention system. If the defendants close the Detention Center, as their present plans envision, they will be at 115 to 120 percent over design capacity. This Court has long been led to view the opening of the new jail as a critical milestone marking the end of the County's overcrowding crisis, but this analysis of accelerating population makes a mockery of that promise.

The statutory efforts of the most recent session of the Texas Legislature promise no resolution to either the State's or the County's overcrowding problems now or in the near future. Nor is there any sign of amicable settlement of the continuing bitterness between the State and the County over correctional issues. The State defendants, meanwhile, continue to criticize sharply the failure of Harris County judges and criminal justice officials to implement fully and utilize effectively the array of intermediate sanctions underwritten by HB2335 funding.

It is imperative that this Court begin now to explore for enduring remedies in this case that offer some hope of curbing overcrowding, while reducing federal judicial intervention in the correctional affairs of Harris County. The remedies adopted to date by this Court have been, at best, stop-gap measures that have proven unequal to the task of effectively reducing population. Over the past several years, the Texas legislature, while allocating funds for the construction of some additional cells, has opted to deal with current overcrowding by creating a structure of administrative good time that accelerates the eligibility of prisoners for parole to the point where the vast majority of prison sentences are now served in about one-twelfth of the assessed time. A series of violent, heinous crimes committed in Harris County by parolees recently released from prison after serving only small fractions of their sentences has eroded public confidence in the criminal justice system, and any further acceleration of releases, even for misdemeanors, will totally undermine that trust and render impotent the deterrent effect of incarceration. Only repudiation of the Bill of Rights is worse. Transfers of inmates to other counties have been plagued by formidable logistical problems and, in the best of circumstances, present only a finite alternative housing resource. None of the defendants are receptive to temporary housing as a viable alternative. The creation of intermediate sanctions has had disappointingly little effect to date. The complexity of the overcrowding problem, a root cause of constitutional deficiencies, has so far defied every remedial approach.

Over the past three years, the Court has repeatedly urged the State and County defendants to help the Court identify and articulate some remedial framework to meet constitutional requirements. Instead, the defendants have engaged in unremitting mutual fault-finding and recimination, and provided the Court with little or no guidance in th search for an effective remedy. As we approach the next major milestone in this case, that pattern cannot be repeated.

I therefore direct the Fact Finding Special Master to prepare a detailed analysis and review of sentencing patterns in Harris County, with special emphasis on the extent to which state district court judges use available pre-trial service and intermediate sanctions and the extent of disparity in bail and sentencing practices. For some two years now, the State defendants have insisted that Harris County criminal sentences are excessively harsh and punitive. I direct the Fact Finding Special Master to attempt to assess the validity of this characterization and report his findings to the Court. To the extent that such resources exist, the Fact Finding Special Master is directed to incorporate in his report applicable findings from existing research efforts in these same areas.

The Fact Finding Special Master shall file his report with the Court within 60 days, so hearing may be held on his findings and any other matters relevant to a post-September remedy in this case. Because of the need for haste in the compilation of this report, the Fact Finding Special Master is specifically authorized to employ such additional assistants or independent specialists as may be necessary to perform this expedited analysis and review. Costs of the review shall be assessed initially against the County defendants, although the ultimate allocation of costs for the study shall be determined when the Court sets and allocates appropriate fees and expenses in this case.

SIGNED THE 10th day of June, 1991.

James DeAnda
Chief Judge
United States District Court

APPENDIX N

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, et al.,	§	
Plaintiffs,	§	
v.	§	CIVIL ACTION
	§	NO. H-72-1094
SHERIFF OF HARRIS COUNTY, et al.,	§	
Defendants.	§	

ORDER

In accordance with the orders of this Court entered February 7, 1991, March 15, 1991 and April 23, 1991, it is hereby

ORDERED

that the State Defendants shall deposit into the registry of the Court, fund 4:72cv1094-02, on or before June 10, 1991, the sum of one million dollars ($1,000,000.00) from which the County Defendants shall be authorized to pay up to $40.00 per day for each prison-ready felon transferred from the Harris County Jail Facilities to other Texas County detention facilities.

SIGNED this 28th day of May, 1991.

_____

Chief Judge
United States District Court

APPENDIX O

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI; ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
VS.	§	CIVIL ACTION
	§	NO. H-72-1094
SHERIFF OF HARRIS COUNTY, TEXAS; ET AL.,	§	
	§	
Defendants,	§	
	§	
VS.	§	
	§	
WILLIAM P. CLEMENTS; ET AL.,	§	
	§	
Third-Party Defendants.	§	

ORDER

The Court's current remedial order of February 7, 1991, as modified on March 15, 1991, remains in effect only until May 1, 1991, also the date on which oral argument is scheduled before the United States Court of Appeals for the Fifth Circuit on the various petitions and appeals filed in this case. So that the appellate court may know the intended course of this Court's continued remedy, it is important that the next order be issued promptly.

As of April 15, 1991, the population of the Harris County detention facilities was 7,565, or 1,265 over the cap imposed in the February 7, 1991 Order. The State defendants deposited $750,000.00 in the Registry of the Court on April 2, 1991. Since then, the County defendants have transferred only 250 convicted felons ready for transfer to the Institutional Division of the Texas Department of Criminal Justice (TDCJ-ID) to other county jails. Another 120 prisoners are scheduled for transfer during the week of April 15, 1991, but it is reportedly unlikely that the County defendants will be able to transfer more than 360 prisoners by the end of April, leaving the total population some 1,200 prisoners over the cap at the expiration of the current order on April 30, 1991. The County defendants, thus, have failed to comply with the terms of the February 7, 1991 Order, as amended on March 15, 1991.

The County defendants cite the difficulties of completing legal and financial arrangements for the ordered transfers, especially in light of the uncertainty over funding which was not resolved until April 1, 1991, and report that they are ready to transfer up to 1,500 prisoners in May, if required to do so.

It is necessary to repeat the warnings contained in the Court's March 15, 1991 Order. When that order was issued, the overall population of the Harris County detention facilities stood at 7,376, or 157 percent of their design capacity; now, it is at 7,565, or 161 percent of the design capacity. This present total exceeds by 1,565 that number of prisoners the Alberti monitor and the State defendants' expert testified could be managed safely and securely for even a limited period of time. These population figures are approaching crisis proportions. As noted on March 15, 1991: "We are talking here about life and death, and the most fundamental rights of the plaintiff class." The danger to the plaintiffs has grown, not diminished, over the past two months.

In the meantime, the State appellate court has not yet decided pending litigation over the allocation of responsibility and costs for the maintenance of felons ready for transfer to TDCJ-ID in county detention facilities, nor has the State legislature dealt definitively with that issue. At the same time, the Fifth Circuit is now reviewing the various pending petitions and appeals in this case.

In accordance with the foregoing, it is ORDERED:

1. That the remedial decree entered in this case on February 7, 1991, as modified on March 15, 1991, shall remain in effect until September 15, 1991. The State defendants shall be required to deposit in the Registry of the Alberti Court additional deposits when the Court is notified by the County defendants that the original $750,000.00 deposited by the State defendants on April 2, 1991 is exhausted, unless the Fifth Circuit directs otherwise after its consideration of the parties' petitions and appeals.

2. As before, the Court specifically retains jurisdiction over this matter.

SIGNED this 22nd day of April, 1991, at Houston, Texas.

JAMES DeANDA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX P

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI; ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	CIVIL ACTION
	§	NO. H-72-1094
JOHNNY KLEVENHAGEN; ET AL.,	§	
	§	
Defendants.	§	

ORDER

The State defendants in this case have sought to vacate or stay the Court's remedial order signed February 7, 1991, while the plaintiffs and the County defendants seek a number of modifications to the same order.

The State's motion to vacate or stay the order is DENIED. According to the most recent statistics provided by the County defendants to the parties and the Court, the population of Harris County detention facilities on Monday, March 11, 1991, was at 7,376 prisoners or 157 percent of the design capacity of those facilities. This number exceeds by 1,376 the number of prisoners the Alberti monitors and the State defendants' own witness testified could be managed safely and securely for even a limited period of time. These population figures are beginning to approach these numbers that led to the outbreak of a respiratory, pneumococcal epidemic that struck down dozens of inmates and claimed two lives in mid-1989. We

are talking here about life and death, and the most fundamental rights of the plaintiff class.

The February 7, 1991 order carefully refrained from actions with a direct and substantial effect on the Texas prison system. In In re Clements, the Fifth Circuit transferred to the Ruiz court only "so much of the remedy portion of the Alberti third-party action as seeks to enjoin them to receive or take prisoners into TDC confinement (or to otherwise take action in the operation or management of TDC-operated confinement facilities)." 881 F.2d 145, 153 (5th Cir. 1989). A requirement that the State defendants provide funds to underwrite tentatively the transfer of felons to other county jails represents no departure from the Fifth Circuit's directive. As understood by this Court, the Fifth Circuit did not immunize the State defendants from contributing in any form to the remediation of unconstitutional conditions for which they have been found liable.

This Court's February 7, 1991 order did not impose final responsibility on the State for the cost of any transfers required pursuant to the Order. Rather, that Order expressly recognized that the allocation of responsibility and costs for the maintenance of felons ready for transfer to the Institutional Division of the Texas Department of Criminal Justice (TDCJ-ID) was an issue in litigation currently pending in the State courts and that the outcome of that litigation will determine any appropriate final accounting for these costs in this case. That the February 7, 1991 order included a preliminary assessment at all was due to the fact that other Texas counties could not be expected to receive felons ready for transfer to TDCJ-ID from Harris County without advance payment. Representatives of the Sheriff's Department have testified that counties contacted by the County defendants refused to consider any transfers from Harris County without the promise of immediate payment. There is, then, no issue of abstention here, nor, ultimately, are Eleventh Amendment and Pennhurst principles raised by the Court's February 7, 1991 order, which, while seeking to address immediate and critical constitutional deficiencies, left to State

courts any final accounting. Given all of these circumstances, it is hard to identify another case in which the burden of suffering irreparable and substantial harm rests more clearly on the party opposed to the movant. The State defendants' motion to delay further the relief of unconstitutional conditions in Harris County detention facilities is DENIED.

In response to the motions of the plaintiffs and the County defendants, the following modifications to the February 7, 1991 order are adopted:

1. Paragraph 1 of that order is amended to read:

> This remedial decree supersedes all previous remedial orders in this case that conflict with the terms of this order, and shall remain in effect until Mav 1, 1991.

2. Paragraph 2 of the February 7, 1991 order which reads:

> The overall population of Harris County detention facilities shall be reduced to 6,300 within 45 days of the entry of this order. Within that overall cap, the County population shall not exceed 4,725, or 75 percent of the overall population, and shall include convicted felons not ready for transfer to TDCJ-ID and parole violators. The population of convicted felons in Harris County detention facilities ready for transfer to TDCJ-ID shall not exceed 1,575, or 25 percent of the overall population.

is amended to read as follows:

> The overall population of Harris County detention facilities shall be reduced to 6,300 within 45 days of the entry of this order. Within that over-

> all cap, the County population shall not exceed 4,725, or 75 percent of the overall population, and shall include convicted felons not ready for transfer to TDCJ-ID and parole violators. The population of convicted felons in Harris County detention facilities ready for transfer to TDCJ-ID shall not exceed 1,575, or 25 percent of the overall population. In any event, the total population of Harris County detention facilities shall not exceed 6,300 for more than seven consecutive days without triggering the transfer provisions of this order.

3. That portion of paragraph 3 of the February 7, 1991 order which reads:

> If necessary to meet the overall population cap of 6,300 described in paragraph 2, above, the Sheriff of Harris County shall transfer prisoners ready for transfer to TDCJ-ID with sentences of from five to no more than 15 years in groups of 25 inmates to other Texas County detention facilities identified and selected by the Sheriff.

is amended to read as follows:

> If necessary to meet the overall population cap of 6,300 described in paragraph 2, above, the Sheriff of Harris County shall transfer prisoners ready for transfer to TDCJ-ID with sentences of five or more years to such other Texas County detention facilities that meet the minimum standard of the Texas Commission on Jail Standards and are identified and selected by the Sheriff. Transfers made pursuant to this provision shall be conducted once weekly.

4. That portion of paragraph 4 of the February 7, 1991 order which reads:

> The County defendants shall file a bond for $750,000.00 with the Registry of the Alberti Court by March 20, 1991 in the event that the State defendants prevail on the issue of cost allocation in the pending State litigation.

is amended to read as follows:

> The County defendants shall file with the Registry of the Alberti Court by March 20, 1991 a resolution adopted and passed by the Commissioners Court of Harris County that the County "is financially able to and has adequate resources from which to pay $750,000.00 in the event State defendants ultimately prevail on the issue of cost allocation."

5. Paragraph 6 of the February 7, 1991 order is amended to read as follows:

> The County defendants shall staff and occupy the new boot camp at the Detention Center in Humble by May 1, 1991 and the residential probation program in the 701 Building by September 1, 1991.

All other modifications sought by the parties to the February 7, 1991 order are DENIED.

SIGNED this 15th day of March, 1991, at Houston, Texas.

JAMES DeANDA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX Q

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, et al., Plaintiffs,	§	
v.	§	
SHERIFF OF HARRIS COUNTY, TEXAS, et al.,	§	Civil Action No. 72-H-1094
Defendants, and Third-Party Plaintiffs,	§	
v.	§	
WILLIAM P. CLEMENTS, et al., Third-Party Defendants.	§	

MEMORANDUM OPINION

On February 7, 1991, the Honorable James DeAnda, Chief Judge of the United States District Court for the Southern District of Texas, as the sitting judge in this action, entered an order, part of which directed the State third-party defendants to deposit in the registry of the Alberti court $750,000.00, to be used to pay the costs of detaining in other county detention facilities some of Harris County's overflow inmates who have been sentenced to the Texas Department of Criminal Justice - Institutional Division. In response to that order, the State defendants filed its motion to vacate or to stay the order, directing its motion both to Judge DeAnda and to myself, as the sitting judge in Ruiz v. Estelle, 503 F.Supp. 1265 (S.D. Tex.

1980), aff'd in part and vacated in part, 679 F.2d 1115, amended in part, 688 F.2d 266 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983).[1]

As I explained in the memorandum opinion I filed contemporaneously with Judge De Anda's February 7 Order, I did not join with that portion of the order relating to the deposit of $750,000.00, for two reasons. First, I noted that I had not been directed to any portion of the record, developed before Judge DeAnda in Alberti, which relates to whether or how an order requiring the State to pay $750,000.00 into the court registry will affect the State's ability to comply with the orders entered in Ruiz. Without an appropriate reference to the record in that respect, I could not determine whether that specific party of the relief ordered would fall within the category of matters arising out of the Alberti litigation which the Fifth Circuit, in In re Clements, transferred to the Ruiz court. Second, I explained that if the question whether Texas law requires the State to bear the costs of confining some of Harris County's overflow Institutional Division-ready inmates were placed before me, my understanding of principles of abstention would lead me to refrain from ruling on it.

In regard to the pending motion of the State defendants, I should make two observations. First, because I did not join in entering the order to which the State's motion is addressed, I cannot properly grant the relief the State defendants now seek. See Gallimore v. Missouri Pac. R. Co., 635 F.2d 1165, 1171-72 (5th Cir. 1981). Second, with regard to the question whether or

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[1] After the Governor of the State of Texas, the Director of the Texas Department of Corrections, the members of the Texas Board of Corrections, and the State of Texas were made third-party defendants in the Alberti action, the Court of Appeals for the Fifth Circuit directed the transfer to the Ruiz court of "so much of the relief portion of the third-party complaint [in Alberti] as seeks an injunction ordering [the State defendants] to receive or take prisoners into TDC confinement or to otherwise take action in the operation or management of TDC-operated confinement facilities." In re Clements, 881 F.2d 145, 154 (5th Cir. 1989) (emphasis in original).

how requiring the State to pay $750,000.00 into the registry of the Alberti court would affect the State's ability to comply with Ruiz, I take note of the excerpts from the testimony in Alberti of David McNutt, Assistant Director for Budget and Managing Services for the Institutional Division of the Texas Department of Criminal Justice, attached as exhibit D to the State's motion, which is incorporated herein by reference. After consideration of that testimony, I conclude that the State's ability to comply with the orders entered in Ruiz will be endangered by the requirement that it pay $750,000.00, and possibly more, for the detention of some of Harris County's overflow Institutional Division-ready inmates. To be specific, I find that this aspect of the relief ordered against the State defendants likely will adversely affect their ability to operate and manage TDCJ-operated confinement facilities in such manner as to comply with the Ruiz decree. I would note that I do not find any other aspect of the relief Judge DeAnda has directed in the February 7 order to conflict in any way with the provisions of the Ruiz decree.

SIGNED this 15th day of March, 1991.

William Wayne Justice
United States District Judge

APPENDIX R

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE R. ALBERTI, et al., Plaintiffs,	)	
v.	)	
SHERIFF OF HARRIS COUNTY, TEXAS, et al., Defendants/Third-Party Plaintiffs,	)	C. A. No. 72-H-1094
v.	)	
WILLIAM P. CLEMENTS, et al., Third-Party Defendants.	)	

ORDER

Since early 1990, the combined Courts* have searched for some feasible and equitable solution to the overcrowding problem in Harris County detention facilities. After the Alberti Court found conditions in those facilities unconstitutional and both the State and County defendants liable for such conditions, the combined Courts supervised lengthy negotiations among the

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*In August, 1989, the U. S. Court of Appeals for the Fifth Circuit issued a writ of mandamus directing the coordination of remedies in the instant case with prior directives of the federal district court in Ruiz v. Lynaugh, 503 Fed. Supp. 1265 (S.D. Tex. 1980); In re William P. Clements, et al., No. 89-2706 (1989). Pursuant to those directions, the Alberti and Ruiz courts have conducted joint hearings on remedial issues and in the Alberti case and issued joint remedial orders.

parties and conducted lengthy hearings on proposed remedial plans. On April 5, 1990, the Courts entered a remedial order imposing a series of progressively reduced caps on the population of the Harris County detention facilities. The order directed the State defendants to remove from Harris County facilities a specific number of convicted felons ready for transfer to the Institutional Division of the Texas Department of Criminal Justice (TDCJ-ID) and provided for automatic awards of administrative good time to certain limited classes of convicted felons if the State defendants failed to remove the specified number of prisoners. The order also provided for the releases of convicted misdemeanants and pre-trial detainees, commencing with those least likely to pose a threat to public safety, if the County defendants failed to reduce the number of County prisoners to prescribed levels.

That April order lapsed on August 31, 1990, by which time the State defendants had removed the required number of felons ready for transfer to TDCJ-ID. The number of County prisoners exceeded the applicable cap by 254 inmates on August 31, 1990, and releases of pre-trial detainees and misdemeanants occurred in early September. Meanwhile, after further hearings, the combined Courts entered a new remedial order on September 7, 1990. This order extended the existing overall population cap of 6,100 prisoners on the Harris County detention facilities to December 31, 1990, when a further reduction to 6,000 was required. The order also imposed internal caps on the State and County, with the State being limited to 1,350 felons ready for transfer to TDCJ-ID and the County being limited to a total of 4,750 prisoners. As in the previous order, the new mandate provided for expedited awards of good time to accelerate the release on parole of felons and ordered the direct release of certain pre-trial detainees and misdemeanants if the parties were unable to meet their respective internal caps.

Since neither set of defendants was able initially to meet its internal cap, both sought a stay from the combined Courts,

while the State defendants also sought prematurely a stay from the Fifth Circuit Court of Appeals. Hearings before the Alberti Court followed, during which State and County defendants argued for a moratorium on any further releases and sought additional time to develop alternatives other than releases for dealing with the excess population. On October 24, 1990, the combined Courts, without ruling on the defendants' applications for a stay, ordered the parties to meet with the Special Master in the Alberti and Ruiz cases and attempt to generate some acceptable plan for dealing with the population problem that did not rely on releases.

During September and October, 1990, meanwhile, the State and County defendants had expedited their cooperative work on developing, funding and implementing programs for intermediate, alternative sanctions pursuant to House Bill 2335, passed by the Texas Legislature in 1989 to encourage the development of local correctional programs and facilities for felons traditionally sentenced to TDCJ-ID. In early November, the defendants reported significant progress in the development of these programs and the Alberti Court granted the defendants a further extension of 50 days on November 19, 1990 within which to attempt to implement sufficient alternative program plots to reduce the number of felons committed to TDCJ-ID in Harris County detention facilities.

While a substantial number of programs for intermediate sanctions has been created in the intervening 60 days, State District Court judges have only begun to integrate them into regular sentencing patterns. While there has been some reduction in the number of felons committed weekly to Harris County detention facilities for delivery to TDCJ-ID, that number continues to exceed the number of felons removed from Harris County detention facilities weekly through transfer to TDCJ-ID or released on parole by an average of some 50 prisoners. According to statistics provided to the court by the County defendants through the Special Master, the total population of prisoners in Harris county detention facilities on January

21, 1991 was 6,715, 715 prisoners over the currently applicable overall population cap of 6,000. With the excess of commitments over removals running at an average of 50 a week, we can anticipate a monthly increase in total population of some 215, assuming, of course, that the County defendants manage to hold their numbers in check. If that rate of growth continues, we are looking at numbers in excess of 7,300 within the next 50 days, unless steps are taken forthwith to limit or reduce the population. In hearings in August, 1990, both the Alberti Special Master and the State defendants' expert testified that Harris County detention facilities could probably be managed safely and securely for a limited period at a population level somewhere between 5,500 and 6,000. Even more alarming is the specter that, if the current numbers continue unabated, the County prisoner population will exceed the County's design capacity within 30 days of the opening of its new 4,000-bed 701 Building scheduled to be ready for occupancy on September 1, 1991.

In the long term, probably the best hope for County and State defendants alike is a rapid expansion in the utilization of intermediate sanctions developed pursuant to HB 2335. The Count defendants have proven themselves capable of creating the programs needed for such sanctions, but the reluctance of State District Court judges to use them is beyond the reach of the federal court in this case. But let no one be misled by the consequences of sate judges' preference for prison sentences and their disregard for alternative sanctions. It is no great blow for law and order to send so many offenders to prison that the only way the State can handle them is to accelerate their release. Present policies and practices are making a mockery of criminal sanctions and churning people through the prison system so rapidly, there is scarcely any sanction at all. The result is the increasingly widespread erosion of public confidence in the criminal justice system. The furor last September over releases in Harris County was simply symptomatic of a much deeper, growing public anger.

The State defendants, meanwhile, after earlier appealing the November 19, 1990 Order that gave parties an additional 60 days to develop alternatives, have now filed a motion seeking to extend that same order. February marks the 39th month, dating from September, 1988 since the Alberti Monitors identified the overflow of felons ready for transfer to TDCJ-ID as a serious problem contributing substantially to unconstitutional conditions in Harris County detention facilities. The time for further delay has passed and the State defendants' motion is denied.

The next construction milestone for the County defendants comes at the end of April, 1991, when they are due to open a boot camp for 382 prisoners and a residential probation facility for 192 convicted offenders. Recognizing the State and County defendants' efforts to expand both the implementation and use of intermediate sanctions pursuant to HB 2335, the need to avoid further direct releases or releases accomplished through the further acceleration of parole; and the existence of pending litigation in the state courts over the allocation of responsibility and costs for the maintenance of felons ready for transfer to TDCJ-ID in county detention facilities. What is called for is a short-term remedial decrees that is designed to bridge the gap between the present and the next construction milestone, which leaving room for the State and County defendants to continue and expand their present separate and joint efforts to contain their respective populations, but one that also sets some limits on immediate overall population growth and provides tools for addressing continued overcrowding. None of the remedial measures encompassed in this order affect the population cap imposed on TDCJ institutions as a result of the various orders and agreements in the Ruiz case, nor do they require the supersedence of the statutorily-based allocation formula adopted by the State defendants to protect the integrity of the Ruiz orders and agreements.

It is therefore ORDERED:

1. This remedial decree supersedes all previous remedial orders in this case, and shall remain in effect until May 1, 1991.

2. The overall population of Harris County detention facilities shall be reduced to 6,300 within 45 days of the entry of this order. Within that overall cap, the County population shall not exceed 4725, or 75 percent of the overall population, and shall include convicted felons not ready for transfer to TDCJ-ID and parole violators. The population of convicted felons in Harris County detention facilities ready for transfer to TDCJ-ID shall not exceed 1575, or 25 percent of the overall population.

3. If necessary to meet the overall population cap of 6,300 described in paragraph 2, above, the Sheriff of Harris County shall transfer prisoners ready for transfer to TDCJ-ID with sentences of from five to no more than 15 years in groups of 25 inmates to other Texas county detention facilities identified and selected by the Sheriff. Any such felons transferred to other county detention facilities shall continue to be Harris County prisoners until they are released on parole in absentia (PIA), or moved to a pre-parole transfer program (PPT) or transferred to TDCJ-ID under Harris County's weekly allocation.

4. The State defendants shall deposit in the Registry of the Alberti Court $750,000.00 by March 20, 1991, from which the County defendants shall be authorized to pay up to $40.00 per diem for each transferred inmate. The county expenditures shall be reimbursed from this fund upon application to the court and upon approval and order of payment by the court. If this initial fund is exhausted prior to the expiration of this Order, the Court shall direct such additional deposits as may be necessary to carry out the terms of the Order. The County defendants shall pay the costs of transportation. If the County population exceeds its internal cap of 4,725 prisoners, the County defendants shall be required to

pay the per diem cost for each prisoner in excess of the 4,725-cap on any one day, although only TDCJ-ID-ready felons shall actually be transferred. Thus, for example, if the County population on a given day is 4,750, the County defendants shall be responsible for paying the per diem for 25 of the TDCJ-ID ready felons transferred to other county jails on that day.

This assessment of costs is tentative and preliminary and shall be reevaluated and finalized contingent on (1) the outcome of pending litigation in State courts over the allocation of costs for maintaining felons ready for transfer to TDCJ-ID in county facilities; and (2) the extent to which HB 2335 alternatives are implemented in Harris County and the number of felons committed to TDCJ-ID is reduced. The County defendants shall file a bond for $750,000.00 with the Registry of the Alberti Court by March 20, 1991 in the event that the State defendants prevail on the issue of cost allocation in the pending State litigation.

5. The County defendants shall continue to be required to do everything necessary to occupy the new 701 building by September 1, 1991. They shall continue to provide funding for and conduct the recruitment, hiring and training of staff to operate the 701 Building. The County defendants shall be assessed a substantial daily fine for each day beyond September 1, 1991 they fail to occupy the 701 Building. "Occupy" in this context refers to the housing of a substantial number of prisoners, not a token contingent.

6. The County defendants shall staff and occupy the new boot camp at the Detention Center in Humble and the residential probation program in the 701 Building by April 15, 1991.

7. The County and State defendants shall continue to cooperate to expand and implement intermediate sanctions pursuant to HB 2335. The County defendants shall take all measures required to keep State District Court judges knowledgeable about the nature and availability of these sanctions.

8. Between the date of the entry of this order and May 1, 1991, the State defendants shall maintain the current allocation formula for admissions to TDCJ-ID pursuant to Tex. Rev. Civ. Stat. Ann. art. 6166a-4. That proportional share of admissions to TDCJ-ID shall apply to all additional capacity that becomes available during the period covered by this order. The State defendants may take any other steps consonant with State law and federal court orders to reduce the TDCJ-ID ready population in Harris County detention facilities.

9. The County defendants shall compile and submit to the State defendants every ten days a list of prisoners potentially eligible for parole in absentia (PIA) or pre-parole transfer (PPT) together with the necessary paperwork on each identified prisoner. The County defendants shall be responsible for forwarding the necessary paperwork on eligible prisoners within ten days of their receipt of the requisite paperwork from courts or prosecutors. The State defendants shall take final action on parole within 45 days of receiving notification from all personnel that a prisoner is eligible, together with the receipt of all necessary paperwork. The period of time consumed by the "Notice to Trial Officials" procedures shall not be included in this 45-day time limit. The State defendants shall be required to take final action on prisoners eligible for PPT within 45 days subject to the availability of PPT beds.

10. The Court specifically retains jurisdiction over this matter.

SIGNED this 7th day of February, 1991, at Houston, Texas.

JAMES DeANDA
CHIEF JUDGE
UNITED STATES DISTRICT COURT